Supreme Court, U.S.
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NO. 90-1461

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

Mary H Carter, Tahnella Jackson, and Lemore Allen,
Petitioners

v.

South Central Bell,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ISSUES PRESENTED

1. Does 42 USC sec. 1981 apply to the discharges of Carter and Jackson, particularly where they involve the equal opportunity to make and to avoid making contracts?

2. Is Allen's retaliatory discharge actionable under sec. 1981?

3. If sec. 1981 does not apply to the discharges of Carter and Jackson, should Patterson fairly apply retroactively where the two purposes of Patterson - as stated by the Court of Appeals - have already been served? Where the Court's finding that Carter and Jackson had not proved retroactivity would be unfair was based on: (1) failure to meet a burden of proof that did not arise until post-trial; (2) the Court's new, changed "findings" about Patterson's reasons for filing under sec. 1981 (see Lavender, infra); (3) no opportunity on remand for Carter and Jackson to meet their burden of showing unfairness.

4. Should Patterson fairly apply retroactively to Allen's retaliatory discharge?

5. Does the Court have a duty to find a cause of action in the "noticed" facts of Carter and Jackson's complaints where the facts pleaded under sec. 1981 were the same as those that could have been timely pleaded under Title VII and the only reason the Court dismissed their complaints was "because section 1981 no longer affords them a basis on which we can grant relief"?

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties to the proceeding in the Court of Appeals in so far as its judgment is sought to be reviewed.

TABLE OF CONTENTS

Page

ISSUES PRESENTED i

LIST OF PARTIES i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

DECISIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATUTE PRESENTED FOR REVIEW 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 2

ARGUMENT 4

1. Section 1981 applies to Carter and Jackson's contractual, discriminatory discharges 4
2. Section 1981 applies to Allen's retaliatory discharge 8
3. Patterson should not fairly apply retroactively to Carter/Jackson because its purposes have already been served and she is not similarly situated with Patterson 9
4. Patterson should not fairly apply retroactively to Allen's retaliatory discharge 12
5. The Court of Appeals had a duty to find a cause of action under Title VII in the facts of the Carter/Jackson complaints, notwithstanding plaintiffs' citation of a failed legal theory (sec. 1981) 13

CONCLUSION 18

APPENDIX A - Appellate Opinion in This Matter

APPENDIX B - Denial of Rehearing & Rehearing En Banc in This Matter

TABLE OF AUTHORITIES

Page

Cases

Airline Pilots Ass'n v. Transamerica Airlines, Inc.
817 F.2d 510,516 (9th Cir. 1987) 14

Bell v Hood, 66 S. Ct. 773 (1946) 17

Bramlet v. Wilson, 495 F.2d 714,716 (8th Cir. 1974) 14

Conley v. Gibson, 78 S.Ct. 99, 102, 103(1957) 12, 16

Doss v. South Central Bell, 834 F.2d 421, 424
(5th Cir. 1987) 15

Dotschay v. National Mutual Ins. Co., 240 F.2d 221,223
(5th Cir. 1957) 13

Dussouy v. Gulf Coast Investment Corp., 660 F.2d 594
(5th Cir. 1981) 15

General Guaranty Ins. Co. v. Parkerson, 369 F.2d 821,825
(5th Cir. 1966) 13

Gins v. Mauser Plumbing Supply, 148 F.2d 974,976
(2d Cir. 1945) 14

Haddock v. Board of Dental Examiners, 777 F.2d 462
(9th Cir. 1985) 13

Hernandez v. Hill Country Telephone Co-Op., Inc.,
849 F.2d 139 (5th Cir. 1988) 11

Hicks v. Brown Group, Inc., 902 F.2d 630 (11th Cir. 1990),
reh. and reh. en banc den. 8

TABLE OF AUTHORITIES (continued)

Page

Cases

Hormel v. Helvering, 61 S. Ct. 719 (1940) 16

Jenkins v. Fidelity Bank, 365 F.Supp. 1391, 1398 (E.D.Pa. 1973) 14

Lavender v. V & B Transmissions and Auto Repairs, 897 F.2d 805 (5th Cir. 1990) 9

Lynch v. Baxley, 651 F.2d 387 (5th Cir. 1981) 16

Merwine v. Bd. of Trustees, 754 F.2d (631) (5th Cir. 1985) 11

Parr v. Great Lakes Express Co., 484 F.2d 767, 773 (7th Cir. 1973) 14

Partridge v. Two Unknown Police Officers, 791 F.2d 1182, 1189 (5th Cir. 1986) 17

Patterson v. McLean Credit Union, 109 S.Ct. 2363 (1989) ..... passim

Robertson v. Johnston, 376 F.2d 43 (5th Cir. 1967) 12

Rohler v. TRW, 576 F.2d 1260 (5th Cir. 1978) 15

Thomas W. Garland, Inc. v. City of St. Louis, 596 F.2d 784 (8th Cir. 1979) 14

TABLE OF AUTHORITIES (continued)

Page

Cases

Thompson v Allstate Ins. Co., 473 F.2d 746,749 (5th Cir. 1973) 17

Travelers Indemnity Co. v. U.S., 382 F.2d 102,106 (10th Cir. 1967) 17

U.S. v. Howell, 318 F.2d 162,166 (9th Cir. 1963) 14

U.S. v. Provident National Bank, 259 F.Supp. 373 (E.D.Pa. 1966) 14

Commentators

17 CJS Contracts, sec. 189..... 8

Wright & Miller, Federal Practice and Procedure: Civil 2d sec. 1357..... 14

DECISIONS BELOW

The decision of the United States Court of Appeals, Fifth Circuit, is reported at 912 F.2d 832 (5th Cir. 1990). It is reproduced in the appendix.

Ten copies of the unreported decision of the trial court have been lodged with the clerk.

STATEMENT OF JURISDICTION

The judgment (opinion) of the Court of Appeals was entered on September 27, 1990. A Petition for Rehearing before the panel and a Suggestion for Rehearing en banc were denied on December 6, 1990. The judgment as mandate was entered December 17, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254 (1). Jurisdiction in the trial court was based on 28 USC 1343.

STATUTE INVOLVED

42 USC sec. 1981:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.

STATEMENT OF THE CASE

This petition arises out a motion for partial dismissal (based on Patterson) filed by defendant pending plaintiffs' appeal from a judgment dismissing their complaints. (The motion does not seem to be mentioned in the Court's opinion.) All three (3) plaintiffs appealed; the Fifth Circuit granted the motion as to Carter and Jackson. As to Allen, the Court dismissed his sec. 1981 discharge action, but maintained his Title VII discharge action. All three plaintiffs are petitioners here.

SUMMARY OF THE ARGUMENT

1. The discharges of Carter and Jackson, particularly because they involve the equal opportunity to make and avoid making contracts, are actionable under section 1981.

A white employee (at the bottom of the seniority list) was very worried about a layoff. Unless two more senior employees (the two plaintiffs, both black) were laid off, she would be let go. She had a private meeting with her immediate supervisor, probably made a private deal, and quit worrying. Within (11) days, petitioners, not invited to this private meeting, had been tricked into signing a "voluntary" layoff (VAMAP) contract. Petitioners lost their jobs; their co-employee kept hers. Under sec. 1981 petitioners should have had the same opportunity to make a private "job-protection" agreement and the same opportunity to avoid signing the VAMAP layoff contract as the white employee.

Moreover, Patterson did not reach the issue whether sec. 1981 applied to discharges. Petitioners adopt the opinion of the Eleventh Circuit in Hicks, supra, no. 90-324, pending in this Court.

2. Allen's retaliatory discharge is actionable under sec. 1981. Petitioner adopts the opinion of the Eleventh Circuit in Hicks.

3. Patterson should not be fairly applied retroactively to the Carter/Jackson case because its purposes would not be served by retroactivity and petitioners are not similarly situated with Patterson. Those two purposes, as stated by the Court of Appeals - limiting sec. 1981 to contracts and preserving Title VII remedies - have already been served. The gravamen of the actions is the above two discriminatory agreements. Further, plaintiffs, who exhausted all Title VII remedies, could have pleaded a timely count under that section.

Retroactivity is not fair because petitioners are not similarly situated to Patterson. In Lavender, supra, the Court "presumed" that Patterson had filed under sec. 1981 because she was untimely under Title VII. However, in this case the Court made the **new** "finding" that Patterson sued under sec. 1981 for "unknown reasons." Not finding (and not seeking, as on remand) any reason that Carter and Jackson sued under sec. 1981, the Court concluded that because Patterson and petitioners were "similarly situated", petitioners "would have a difficult time proving that retroactive application of the same decision would be unfair...(and) that they have not met that burden."

The burden of proving unfairness, particularly by distinguishing themselves from Patterson, did not arise until post-trial and then only on the Court's new and changed "findings" about Patterson's reasons for proceeding under sec. 1981. On remand, petitioners could show that they obtained right-to-sue letters and that their sec. 1981 complaints were **timely** as to Title VII. In short, petitioners would not have a difficult time distinguishing themselves from Patterson and proving unfairness.

A final, and most important, distinction is that Patterson was not appealing her discharge and the holding of her case was not made retroactive to her discharge. In the present two (2) discharge cases retroactivity works a substantial hardship that deserves a closer look than that given by the Court of Appeals.

4. Patterson should not be fairly applied retroactively to Allen's retaliatory discharge because the Title VII conciliatory purposes would not be served as defendant chose the risk of sec. 1981.

5. Even if sec. 1981 does not apply or Patterson is retroactive, the "accepted rule" is that a complaint "should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." These Carter/Jackson complaints pleaded exactly the same facts as would have been pleaded under Title VII, but invoked sec. 1981. The Court of Appeals had a duty to scrutinize the facts of the complaint for a cause of action and grievously erred when it violated the "accepted rule" by dismissing the complaints because "section 1981 no longer affords...a basis on which we can grant relief." The Court erred when it stated that it had "no duty to substitute (plaintiffs') abrogated ('failed') theory with a valid one." (Emph. added.) It is the facts which state a cause of action, not the plaintiffs' theory of the case!

ARGUMENT

1. Carter and Jackson state a cause of action under 42 USC sec. 1981 as narrowed by Patterson because they were denied the equal opportunity, first, to make a "job protection" agreement with their employer and, then, to avoid

making a "job termination" agreement with their employer.

Although the facts of this argument have been summarized above, they will be briefly expanded here for the sake of clarification. With additions (underlined), this summary tracks that of the Court of Appeals at pages A-4 et seq. of the appellate opinion in the appendix.

Barbara Johansen, a white employee, was the junior employee in the plaintiffs' work group in the Westbank Division of New Orleans; the two petitioners were black and slightly senior to Johansen. On April 6, 1984 defendant, South Central Bell (SCB) announced a layoff. Shortly thereafter (April 11), three plans were announced. Two are of significance: Voluntary Accelerated Management Attrition Program (VAMAP) and Involuntary Management Attrition Program (IMAP). VAMAP would be offered to the senior employees in order; IMAP would be imposed on the junior employees (Johansen) first. After the announcement of these plans, Johansen was very worried about losing her job.

On April 19, 1984, she had a private meeting with her immediate supervisor, Pete Massett. This meeting did not include plaintiffs. After this meeting she was no longer worried. Four days later Massett told plaintiffs that VAMAP would select only fourteen (14) employees and over the next few days also told them that fourteen more senior employees, some of whom were identified by Massett, would be chosen for VAMAP. Convinced by Massett that they could sign the VAMAP contracts and that the fourteen more senior employees, but not the plaintiffs themselves, would be chosen, the plaintiffs picked VAMAP on April 30, 1984. Johansen helped plaintiffs identify some of these fourteen employees and admitted that she knew that anyone who signed up for VAMAP would be selected; she did not pick VAMAP.

A few days later, before SCB announced on May 7 who had been selected for VAMAP, Jackson was surprised when Johansen thanked her for "saving her job." (Johansen admitted that she thanked Carter.) To plaintiffs' further surprise, they were chosen for VAMAP and Johansen kept her job.

The "private meeting" between Massett and Johansen was pivotal to the new contract of "voluntary" termination (VAMAP) that plaintiffs signed. As stated by the Court of Appeals:

> The essence of their claim is that they were manipulated into volunteering because of their race.
>
> .....
>
> All three appellants testified that Johansen was very worried about losing her job after she was told about SCB's need to cut its work force, but that after she had a private meeting with Massett, she was no longer worried. Carter and Jackson allege that they were encouraged to join VAMAP because they are black and that Johansen's job was protected because she is black. (at A5-6)

It is the petitioners' position that at this private meeting which did not include them there was a job protection agreement made with Johansen at their expense. It was at this meeting that the plan for Massett to deceive the plaintiffs into accepting the VAMAP contract was put into action in order to protect Johansen's job. Although no finding whatsoever has been made about the purpose of this meeting, the obvious inference is that Johansen knew what was going to happen and participated in the plan. She was under no illusions about VAMAP - she admitted that she knew if an employee signed up for it then the employee would be chosen and also admitted that even before the VAMAP an-

nouncement was made she "thanked" one of the plaintiffs for "saving her job." Notwithstanding this knowledge, she "helped" plaintiffs in their efforts to locate fourteen other employees who would be taking VAMAP and who would thereby protect the plaintiffs themselves from being selected even if they signed up. When Carter and Jackson signed the "voluntary" layoff form under the VAMAP program, they unknowingly agree to termination.

The Court of Appeals did not consider these "contract" arguments in its ruling on the motion to dismiss. This was error and is reason for granting this petition because these facts fit squarely within the logic and language of the Patterson holding. That case held that a promotion was actionable under section 1981 where

> it involved the opportunity to enter into a new contract with the employer....

and

> ...[o]nly where the promotion rises to the level of an opportunity for a new and distinct relation between the employee and the employer is such a claim actionable under [sec.] 1981. at 2377 (plurality).

Obviously, this is not a promotion case. However, both the "private meeting" and the VAMAP contract ought to be actionable under section 1981. The private meeting excluded the plaintiffs. It was held between the favored employee, Johansen, and her supervisor, Massett. Johansen quit worrying about layoff. Within four days Massett "deliberately misinform[ed]" the plaintiffs about VAMAP. (See appellate opinion, p. A-15.) Obviously a deal was made between Johansen and Massett that rose to the level of a "new and distinct relation" between

Johansen and SCB. She would keep her job and plaintiffs, who were not favored with this opportunity, would lose their jobs[1].

Carter and Jackson were also discriminated against with respect to the VAMAP contract. Deceiving them into signing this contract of termination was the intent of the first agreement to save Johansen's job. Just as they should have had the opportunity to make a private "job security" agreement, they should have had the equal opportunity to avoid making the VAMAP "job termination" contract. In a sense, they were given an unequal opportunity to make a second contract - the VAMAP contract - and that **contractual**, not "constructive", discrimination is actionable under sec. 1981.

Carter and Jackson also adopt the opinion of the Eleventh Circuit in Hicks.

2. Allen's retaliatory discharge is also actionable under sec. 1981.

Patterson did not reach the issue whether discharge was actionable under sec. 1981. Allen adopts the opinion of the Eleventh Circuit in Hicks.

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[1] Objection might be made that the agreement between Massett and Johansen would be unenforceable and that a similar agreement between Massett and petitioners would likewise be unenforceable. However, the lack of enforceability should not alter the fact that an agreement was made and that the petitioners did not have an equal opportunity to make the same agreement. Patterson does not exclude unenforceable contracts from sec. 1981. Furthermore, although the contract might be void, it is not null. 17 CJS, Contracts, sec. 189.

3. Even if the Carter/Jackson complaints do not state a cause of action under sec. 1981, Patterson fairly should not be applied retroactively because the purpose(s) of Patterson is fully satisfied by the circumstances of the filing of this case.

The Court of Appeals states that Patterson has a two-fold purpose: to limit section 1981 to contracts and to preserve the conciliatory scheme of Title VII. With respect to limiting section 1981 to contracts, this statement of purpose is overbroad because, stated this way, a contract claim would already (as above) be actionable under section 1981 as narrowed, and the issue whether Patterson should be retroactive would not be reached. (However, if limiting sec. 1981 to contracts is one purpose, then that purpose is satisfied twice over as shown above.)

Accordingly, it would seem that limiting sec. 1981 to contracts is the "holding" of Patterson, not its purpose. In other words, the only purpose of Patterson in a determination of retroactivity is preservation of the Title VII administrative/ conciliatory purpose. On remand, petitioners would show that they received right-to-sue letters, dated no earlier than March 26, 1985, and that their complaints were filed on April 16, 1985 - well within the period required by Title VII. Unlike certainly the plaintiff in Lavender, supra, and "presumably" the plaintiff in Patterson (see Lavender, supra, at 807) petitioners did not bring their action under sec. 1981 in order to avoid a statute of limitations problem under Title VII. (Further, see pp. 11, 15-17 below.)

In the Court of Appeals' earlier occasion (Lavender, supra) to determine whether to apply Patterson retroactively, the Court expressly found that by the time plaintiff sought to file a sec. 1981 claim of racial discrimination, "the time limitation for Title VII had expired." at 807. It also stated that Patterson "filed a section 1981 action presumably because the Title VII limitation period

expired." Id. Finding an equivalence between the two plaintiffs, the Court affrimed dismissal.

However, in the instant case the Court now abandons its earlier presumption and states that Patterson filed her action under sec. 1981 for "unknown reasons". Without further fact inquiry, the Court then found that Carter and Jackson had also filed sec. 1981 actions for "unknown reasons" and were "similarly situated" to Patterson. Therefore, it would not be unfair also to apply Patterson retroactively against petitioners.

Making such short (and changing) shrift of the fact finding process at the appellate level is extraordinary. In one broad stroke the Court wrecked havoc on several normal processess:

> 1. It has cut off all fact inquiry into whether petitioners are truly similar to Patterson, and for that matter to Lavender (who was known to have filed her sec. 1981 action after time had run out to file a Title VII action).
>
> 2. It has blocked any determination whether the Title VII administrative purpose has been satisfied.
>
> 3. It has thereby prevented any reasonable inquiry whatsoever into whether retroactive application is fair to petitioners.
>
> 4. It has abrogated petitioners' normal pre-trial right to amend to show a cause of action. (See below.)

Finally, as to the fairness issue, **and most importantly,** Patterson was retroactively applied to plaintiff's promotion claim, not her discharge claim. Accordingly, the Court of Appeals is in error when it equates petitioners and Patterson: they are **not** similarly situated and retroactivity is considerably more harsh as applied to petitioners than as to Patterson.

Essentially the Court requires petitioners to have anticipated both Patterson and the new facts about its plaintiff as announced in the present case, i.e., to have distinguished themselves by somewhere explaining in advance of Lavender by "known reasons" why they were bringing their actions under sec. 1981, not Title VII. This process of explanation is properly one on remand for the trial court, not the Court of Appeals. There are more than two (2) categories - known (untimeliness) and "unknown" - of reasons for filing a sec. 1981 action instead of a Title VII action. The Fifth Circuit rule that it will apply Patterson retroactively without remand for a determination of the "unknown" reason clears the docket, but sweeps with too broad a broom - it cuts off all inquiry into whether petitioners have fulfilled the conciliatory purposes of Title VII and, ultimately, the fairness of applying Patterson retroactively.

At the time of filing counsel for petitioners made what then seemed like a harmless pleading choice with no thought of avoiding the conciliatory procedures of Title VII (already completed) in order to seek the greater damages (emotional distress and punitive damages) under section 1981. (See Merwine v. Bd. of Trustees, 754 F.2d 631 (5th Cir. 1985), cert. den. 106 S.Ct. 76; Hernandez v. Hill Country Telephone Co-Op, Inc. 849 F.2d 139, 142 (5th Cir. 1988).

As this Court has held in language relevant to this argument and the "duty" argument below:

> The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. Conley, infra, at 102.

The Fifth Circuit itself has recognized the gross unfairness of proceeding solely on the law at the expense of the facts:

> We see no reason why we should make what we think would be an erroneous decision, because the applicable law was not insisted upon by one of the parties. Robertson v. Johnston, 376 F.2d 43, 44 (5th Cir. 1967), citations omitted.

4. Patterson should not fairly be applied retroactively to Allen's retaliatory discharge.

If sec. 1981 does not cover Allen's discharge, then Patterson fairly should not apply retroactively to the discharge.

By its nature, retaliatory discharge is outside the conciliatory process of Title VII; the facts of this retaliatory discharge place it particularly outside the Title VII process. Here, Allen had gone through the Title VII process on two charges while he was employed at South Central Bell (SCB). Instead of conciliating the parties, the process resulted in a lawsuit during which SCB discharged Allen without any attempt whatsoever at conciliation. Further, the Court of Appeals has found that Allen's discharge was partly motivated by retaliation. In short, SCB has rejected the Title VII process and decided to run the risk of damages under sec. 1981. Under these circumstances, where the Title VII process has been irrelevant, it is unfair to "let SCB off the hook" and avoid a risk it knowingly chose to take.

5. The Court of Appeals ignored its well recognized duty to scrutinize the facts of the Carter/Jackson complaint - even where a "failed" legal theory is cited - in order to find a cause of action under another statute.

The part of the appellate opinion at issue reads:

> Carter and Jackson never pled Title VII. Nevertheless, they claim that we have a duty to substitute Title VII for section 1981, their failed cause of action. They cite two cases this propostition: Hildebrand and Rohler (citations omitted). But the appellants' arguments and the cited authority are relevant only if the appellants' complaint had a jurisdictional defect. (Citation omitted.) We are dismissing their complaints because section 1981 no longer affords them a basis on which we can grant relief...We have no duty to substitute Carter and Jackson's abrogated theory with a valid one.... (at 6389)

The facts of the complaints create in the Court the "obligation" (long recognized by the Fifth Circuit) to "scrutinize the complaint and to let it stand if plaintiff might recover under any state of facts which could be proved in support of the claim..." General Guaranty Ins. Co. v. Parkerson, 369 F.2d 821,825 (5th Cir. 1966), citing Conley, supra; other cites omitted. This duty runs even if "the plaintiff's lawyer has misconceived the proper legal theory of the claim...." Dotschay v. National Mutual Ins. Co., 246 F. 2d 221, 223 (5th Cir. 1957)[2].

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[2] This rule, citing Dotschay, is followed in the Ninth Circuit as well even when the lawyer cites the wrong theory. U.S. v. Howell, 318 F.2d 162, 166 (9th Cir. 1963); Haddock v. Board of

[2] continued next page

This Court has recognized the general rule in Conley v. Gibson, 78 S.Ct. 99, 102 (1957):

> In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

There is no reason to depart from this well-settled rule because the petitioners cited a "failed/abrogated" legal theory and the Court of Appeals cites no authority for its novel rule. No special treatment for a civil rights case is required to implement the established rule and none has been sought. (See

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[2] continued

Dental Examiners, 777 F.2d 462 (9th Cir. 1985); Airline Pilots Ass'n v. Transamerica Airlines, Inc., 817 F.2d 510, 516, also citing 5 C. Wright & A. Miller, Federal Practice and Procedure sec. 1357 (1969).

Judge Clark, then on the Second Circuit, wrote: "... (P)articular legal theories of counsel yield to the court's duty to grant the relief to which the prevailing party is entitled, whether demanded or not." Gins v. Mauser Plumbing Supply, 148 F.2d 974, 976 (2d Cir. 1945).

It is also the rule in the Seven and Eighth Circuits. Parr v. Great Lakes Express Co., 484 F.2d 767, 773 (7th Cir. 1973); Bramlet v. Wilson, 495 F.2d 714, 716 (8th Cir. 1974); Thomas W. Garland, Inc. v. City of St. Louis, 596 F.2d 784 (8th Cir. 1979), cert. den.

Significant district court decisions also recognize this duty. U.S. v. Provident National Bank, 259 F.Supp. 373 (E.D. Pa. 1966), rev'd on other grounds 1967, 87 S.Ct. 1088 (irrelevant statute cited; court should take judicial notice of the correct statute); Jenkins v. Fidelity Bank, 365 F. Supp. 1391, 1398 (E.D. Pa. 1973).

appellate opinion at 6389.)

Several Fifth Circuit cases other than those cited above (including Rohler, distinguished by the Court of Appeals), confirm the Fifth Circuit's well established recognition of its own rule. Rohler is not "relevant only if the appellants' complaint had a jurisdictional defect." (Appellate opinion at A-18.) It holds:

> We believe that the district court has the duty under Rule 8(a)...to read a complaint liberally and to determine whether the facts set forth justify it in taking jurisdiction...**and also whether the facts set forth state a claim for relief on a basis other than the statutory basis pleaded**. at 1264. (Emphasis added.)

Other Fifth Circuit cases hold that failure to correctly categorize the legal theory or pleading an improper legal theory is not fatal to a complaint. Dussouy v. Gulf Coast Investment Corp., 660 F.2d 594, 604 (5th Cir. 1981); Doss v. South Central Bell Telephone Co., 834 F.2d 421, 424 (5th Cir. 1987) and citations. The normal course is to grant leave to amend. Dussouy, supra, at 604; Robertson, supra, at 45 and citation.

Doss, supra, is an excellent case in point. Plaintiff pleaded the wrong statute against this same defendant and repeatedly asserted that the theory at issue was correct. The district court dismissed this claim. The Court of Appeals reversed, although it termed the miscitation "not a technical mistake, but rather, a conscious decision made under an incorrect analysis of the law." at 424. The Court held that "the fact that a plaintiff pleads an improper legal theory does not preclude recovery under the proper theory." (citations omitted) Further, that the district court must "'examine the complaint to determine if the allegations provide for relief on any possible theory.'" at 424. (citations omitted.)

Here, there was likewise a conscious choice to cite what turned out to be the wrong legal theory, but unlike Doss the wrong theory was not knowingly cited. Although the court noted it was the complaint, not the actions of counsel, that were to be considered, it is worth noting that the Doss situation was exacerbated in a way not present here. Yet, amendment apparently was allowed. The Court of Appeals offered no authority why a different result should obtain when the "wrong" cited theory was, as its opinion seems to acknowledge, "right" at the time it was cited and "failed" only after trial.

Finally, the repeal of a statute that was the basis for an action is somewhat analogous to the abrogation of a legal theory. A class of plaintiffs had challenged a statute, repealed and replaced by a new statute. As a consequence, the original named plaintiffs lost their standing, but the Fifth Circuit allowed the subclass to intervene. Lynch v. Baxley, 651 F.2d 387, 388 (5th Cir.1981). Similarly, the petitioners' narrower subclaims under Title VII, minus their claims for emotional distress and punitive damages under sec. 1981, should be allowed to go forward by way of amendment.

The Court's duty to scrutinize a complaint cannot be reduced in a case that even it admits established a "new principle of law" and for that reason failed to support plaintiffs' cause of action. This suggestion is made because procedural rules are "devised to promote the ends of justice, not defeat them." Hormel, supra, at 557. As Justice Black wrote in Conley, supra, at 103:

> The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.

In a similar vein Judge Wisdom wrote in Thompson v. Allstate Ins. Co., 476 F.2d 746, 749 (5th Cir. 1973):

> The time when the slip of a sergeant's quill pen could spell death for a plaintiff's cause of action is past.

The policy of the federal rules is to determine actions on their merits, not dispose of them on technical grounds. Partridge v. Two Unknown Police Officers, 791 F.2d 1182, 1189 (5th Cir. 1986); Travelers Indemnity Co. v. U.S., 382 F.2d 103,106 (10th Cir.1967) (justice is not served when technical rules result in the forfeiture of just claims). Despite the Court of Appeals' citation to Bell v. Hood, supra, as the above cited cases make clear, the court's duty to "look to the way the complaint is drawn" does not run only to jurisdictional problems. at 775.

All that has happened here is that Carter and Jackson chose the wrong theory after following the Title VII conciliatory procedures as far as they were available. They could have filed a timely Title VII complaint; the action was not filed under sec. 1981 to avoid timeliness problems. They ought to be given the opportunity to amend to show a cause of action under Title VII. This is no less than they would have ordinarily been allowed before trial; to refuse after a trial on the merits, apparently for the sake of extending Patterson, seems harsh. Granting leave to amend (if the complaints are found not actionable under sec. 1981) should also include the opportunity to demonstrate on the same facts that this case should not come within the retroactive application of Patterson because its Title VII purpose has been fully met.

In short, the Court's duty should be to determine this case on the merits, not the misfortune of petitioners.

CONCLUSION

As to Carter and Jackson, sec. 1981 should be found to apply to their discharge complaints. (See Hicks.) Moreover, they have been denied the equal opportunity to make two new contracts with their employer. If sec. 1981 does not cover their complaints, then Patterson should be found not retroactive so that the complaints would still be actionable under sec. 1981. If the complaints are not actionable at all under sec. 1981, then the Court should find Title VII causes of action in the facts of their complaints. Finally, if the complaint is found actionable under either legal theory, then the matters should be remanded to the trial court for adequate findings as prayed for in petitioners' original brief.

As to Allen's retaliatory discharge complaint, that should be found still actionable under sec. 1981, notwithstanding Patterson. If not, then Patterson should not be applied retroactively because the conciliatory Title VII purpose has been irrelevant to SCB and it chose to "run the risk" of damages under sec. 1981. The Court should leave SCB where it is.

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

Mary H Carter, Plaintiff-Appellant,
v.
South Central Bell,
Defendant-Appellee.

Tarnella (sic) Jackson, Plaintiff-Appellant,
v.
South Central Bell Telephone Co., Defendant-Appellee.

Lemore Allen, Plaintiff-Appellant,
v.
South Central Bell, Defendant-Appellee.

No. 88-3777.

United States Court of Appeals,
Fifth Ciruit.

September 27, 1990.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before THORNBERRY, JOHNSON, and SMITH, Circuit Judges.

THORNBERRY, Circuit Judge:

Mary H. Carter, Tahnella Jackson, and Lemore Allen appeal a judgment of a United States Magistrate dismissing their claims of racial discrimination by their former employer, South Central Bell Telephone Company (SCB). Because they have not stated a claim under section 1981 of title forty-two, we AFFIRM the dismissal.

The appellants also have asked us to consider their claims under Title VII of the Civil Rights Act of 1964. See 42 U.S.C.

secs. 2000e to 2000e-17. Carter and Jackson never pled Title VII at trial, and we refuse to consider that theory on appeal. Although Allen did plead Title VII as a basis of recovery, we AFFIRM the magistrate's dismissal of two of his complaints under Title VII. But we REVERSE that portion of the magistrate's decision which rejected Allen's claim of retaliatory termination and REMAND it with instructions to reconsider Allen's claim in the light of this opinion.

FACTS AND PROCEDURAL HISTORY

Because the background for Carter and Jackson's claims is different from that of Allen's claims, the history behind Allen's complaint will be discussed separately.

I. CARTER AND JACKSON

Carter and Jackson, black females, were employed in the engineering group of SCB's Westbank Division in New Orleans, Louisiana. Their supervisor was Lester Hopper, a white male.

On April 6, 1984 employees of the Westbank Division learned that SCB wanted to reduce its Louisiana work force by 250 employees, twenty-five of whom would be from the New Orleans area. To mitigate the effect of this reduction on SCB's managers, the Personnel Office in Birmingham, Alabama, created a Management Transition and Assistance Plan (MTAP). Under MTAP, SCB could reduce its work force in one of three ways:

1. Separation in Lieu of Relocation (SILOR). If an employee was designated as available for relocation, the employee would have the option of either relocating or terminating her employment with SCB. If, at that point, the employee decided to terminate employment, she would receive a lump sum payment.

2. Voluntary Accelerated Management Attrition Program (VAMAP). The purpose of VAMAP was to encourage employees to quit their jobs voluntarily. Employees were given a limited period of time during which they could sign a form requesting VAMAP eligibility. From this pool of volunteers, employees would be terminated until the group had been reduced to the desired number of employees. The most senior employees, those with the most service, would be chosen first. Employees who were selected for VAMAP would be given a lump sum payment that was thirty-three percent more than the amount that they would receive if they did not select VAMAP and were terminated under SILOR.

3. Involuntary Management Attrition Program (IMAP). If neither SILOR nor VAMAP had sufficiently reduced the number of employees, employees would be fired and given the same amount that they would have receive under VAMAP.

On April 11, 1984, Peter Massett, a white male supervisor at the Westbank Division, explained MTAP to the Westbank employees. Apparently, Massett told them that the third option under MTAP was "layoff without pay" rather than IMAP. According to SCB's brochure, IMAP was implemented on April 10, 1984; "layoff without pay" was never a possibility.

Although Jackson attended the April 11 meeting, Carter and another female engineer, Barbara Johansen, did not. Johansen is white. On April 16, Massett met with Carter and Jackson and gave them the same information he had given to the others.

Carter and Jackson volunteered for VAMAP and were selected. The essence of their claim is that they were manipulated into volunteering because of their race.

Carter and Jackson testified that Massett had met with them individually and encouraged them to volunteer for VAMAP.

They contend that he told them that only fourteen employees would be selected for VAMAP and that if they chose VAMAP and were not selected, they would be protected from SILOR and from being laid off. Massett denied that he had any idea of how many employees would be selected for VAMAP. He also denied encouraging Carter and Jackson to select VAMAP.

Carter and Jackson made phone calls to other offices to determine how many employees were going to vounteer for VAMAP. They allege that they told Massett of the employees with whom they had spoken and that Massett told them of other senior employees who were going to take the plan. Convinced that at least fourteen managers were going to select VAMAP, all of whom were senior to them, Carter and Jackson chose VAMAP. After they had made their selection, Massett told them that "layoff without pay" was not one of the programs under MTAP. He told them about IMAP and gave them the opportunity to rescind their VAMAP selection. They decided to stick with VAMAP.

As it happened, only thirteen employees in the Westbank Division signed up for VAMAP. All thirteen were chosen. Ten are white, and three, including Carter and Jackson, are black.

Johansen did not choose VAMAP. All three appellants testified that Johansen was very worried about losing her job after she was told about SCB's need to cut its work force, but that after she had a private meeting with Massett, she was no longer worried. Carter and Jackson allege that they were encouraged to join VAMAP because they are black and that Johansen's job was protected because she is white.

Carter and Jackson brought a claim against SCB under alleging racial harrassment and constructive discharge. See 42 U.S.C. sec. 1981. Both consented to a non-jury trial before a U.S. Magistrate, who held that they had failed to prove that SCB's

conduct was racially motivated. They are appealing that decision. See 28 U.S.C. sec. 636 (c).

II. ALLEN

Allen was hired in 1972 and was the first black engineer in the Westbank Division. He contends that SCB discriminated against him in three ways: by failing to transfer him to the "Plannig Group," by lowering his performance rating, and by firing him after he filed charges against SCB with the Equal Employment Opportunity Commission (EEOC).

A. Transfer to Planning

The Planning Department was supervised by Aaron Begnaud, a white male. The Planners were responsible for bringing the main telephone cable into an area, whereas engineers at Allen's level were charged with the more mundane task of connecting local homes and businesses to the main cable. For an engineer at SCB, a transfer to Planning was not a promotion, although it may have been a necessary prerequisite for promotion, it was not sufficient. At trial, Begnaud gave examples of many Planners who had never been promoted.

In September 1984, a position became available in the Planning Group when James Burse, a black employee, was terminated. Allen had expressed an interest in the Planning job, but it was given to Johansen, although she had less experience than Allen. Johansen was hired as an engineer at Westbank in 1973.

B. Allen's Performance Rating

Lester Hopper kept a list of all of the Engineers in the Westbank Division in the order of their contribution to SCB. An engineer could be rated a "major contributor" (MC), a "satisfac-

tory contributor" (SC), or an "unsatisfied contributor" (UC). Only the top fifty percent of the engineers could be given an MC rating. The rankings were determined at a Rank Order Meeting chaired by Hopper, but based on the evaluations by the engineers' individual supervisors. Phil Chavers, a white male, was Allen's supervisor, and his rating of Allen determined where on Hopper's list Allen would be ranked.

In January 1985 and January 1986, Allen was given an evaluation of his job performance that rated him SC. During that same period, Johansen was rated MC. (Johansen's supervisor was Massett.) In January 1984, Allen had been rated MC. Allen contends that he was given an SC rating in 1986 because of his race.

Massett and Chavers used both objective and subjective factors to evaluate engineers. Objective factors included the size and complexity of the tasks that the engineers performed. Among Chavers' subjective reasons for his evaluation of Allen were that Allen did not get along with other SCB employees and with customers, that he did not make a full effort on routine engineering jobs, and that some of his work had been deficient.

C. Retaliation

Allen filed charges with the EEOC claiming that his evaluation and the failure to transfer him to Planning were motivated by racism. After receiving his right to sue, he filed this lawsuit. Several months later he was fired. Allen alleges that he was fired because he filed charges with the EEOC and then proceeded to sue SCB.

On October 21, 1986, Hopper told Allen that he was terminated. The reasons for his discharge have vacillated. Under "reasons for termination," his pink slip says "other," and at the time of his termination, Hopper refused to give him a written

explanation of what "other" meant. SCB later claimed that Allen was terminated because he had given proprietary documents to his attorney and because he had falsified an automobile accident report. At trial, SCB dropped the automobile incident as one of the reasons for his dismissal. Now, in their briefs before this Court, both parties have again discussed the accident. Allen also raises several incidents which, he maintains, illustrate the unfair treatment that he allegedly received after he filed his charges with the EEOC.

1. Proprietary Documents

In August 1986, Allen's counsel used an estimate front sheet in his deposition of Johansen. Estimate front sheets contain information regarding job estimated performed by SCB employees. Several days later, he used a job log book in a deposition of Chavers. Hopper attended both depositions, and after the second, he wrote a letter to his manager, Glenn Andrews, advising him that Allen may have appropriated proprietary information from the company. Andrews asked the security department to conduct an investigation.

The investigation was conducted by John Banquer. Banquer questioned Allen about the estimate front sheet and the log book. Allen refused to answer Banquer's questions without the presence of his attorney. Banquer prepared his report for Andrews. Andrews reviewed the report and concluded that Allen should be discharged. The rationale behind his decision was that Allen had turned over the documents to his counsel and that he had refused to cooperate in the investigation.

The magistrate found that Allen had turned the estimate front sheet and the log book over to his attorney for use in this proceeding, and Allen offered no other explanation for how his attorney obtained them except to say that he thought his attorney had subpoenaed them. Allen also admits that SCB considered this

information to be "proprietary." His only defense is that the documents were not marked "proprietary" even though SCB policy is to state that all "proprietary" documents should be so marked. However, employee instructions, which Allen received at the time of his employment, stated that employees are not to divulge the contents of any SCB document to anyone not associated with SCB.

Even if the documents were proprietary, Allen argues that termination was an exceptionally harsh measure. On October 16, 1986, SCB attorney Charles Rivet sent a memo to Andrews advising him to "go on the offensive" regarding the alleged appropriation of the documents. Allen also introduced evidence the fourteen SCB employees had used the private phone number of a radio station, which SCB admits was "proprietary," to win prizes from the radio station. By calling the private number instead of the public one, they could avoid a busy signal when prizes were offered. All fourteen employees cooperated in the investigation. Twelve, who are white, admitted that they had used the number and were suspended. The two others, who are black, denied any involvement and were not disciplined.

2. False Accident Report

In September 1986, Allen drove over a curb in a company vehicle, and the vehicle was damaged. Allen testified that he told his manager what had happened and that the manager told him to treat it as a flat tire. SCB did not contradict this. Allen filed an accident report stating that he had a flat tire. Because of the amount of damage to the vehicle, SCB conducted an investigation, which determined that Allen had been responsible for the accident. The filing of the false accident report initially was one of the grounds for Allen's termination.

3. Other Incidents

Allen also points to number of incidents that support his retaliation claim. For example, when Allen wrote a letter complaining to Chavers about his ratings, Allen testified that Chavers refused to discuss the letter and remarked, "Everybody knows you filed the lawsuit."

Soon after that, Allen was assigned a rush estimate project, but he was scheduled to go on vacation and advised Chavers that he would not be able to complete the estimate before leaving. Chavers allowed Allen to transfer the estimate to another engineer for completion. The job was done poorly, and the estimate front sheet was issued under Allen's name. Chavers knew that Allen had not performed this job, but he still used it in his quality reviews of Allen.

D. Procedural History

In his initial complaint, Allen asserted that SCB's actions violated both Title VII, see 42 U.S.C. sec. 2000e-5, and section 1981. Allen's action was consolidated with that of Carter and Jackson. After he was terminated, Allen amended his complaint by adding the charge that SCB had fired him vindictively. The magistrate found no support for Allen's charges of discrimination and dismissed his claims.

DISCUSSION

I. RETROACTIVE APPLICATION OF PATTERSON

After this case was tried, the Supreme Court decided Patterson v. McLean Credit Union, __U.S. __, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989), which restricted the use of section 1981 in employment discrimination suits. As a general rule, this Court must apply any relevant interpretation of section 1981 by the

Supreme Court retroactively. See Goodman v. Lukens Steel Co., 482 U.S. 656, 662, 107 S.Ct. 2617,2621, 96 L.Ed.2d 572 (1987); Solem v. Stumes, 465 U.S. 638, 642, 104 S.Ct. 1338,1341, 79 L.Ed.2d 579 (1984). But in some civil cases, a judicial decision should not be applied retroactively if certain criteria countenance prospective application. Rodriquez de Quijas v. Shearson/ American Express, Inc., __ U.S. __, 109 S.Ct. 1917,1922, 104 L.Ed.2d 526 (1989). Three guidelines are used to make this determination: whether the decision establishes a new principle of law; whether the purpose of the rule will be supported if the rule is applied retroactively; and whether retroactive application will produce substantial injustice or hardship. See Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07,92 S.Ct. 349,355-56,30 L.Ed. 2d 296 (1971).

This Circuit has already concluded that Patterson does establish a new principle of law, which would militate against retroactivity, but that the purpose of Patterson is best served by retroactive operation. See Lavender v. V & B Transmissions & Auto Repair, 897 F.2d 805,806-07 (5th Cir. 1990). If the purpose of the rule is served by applying it retroactively, this should be given greater weight than the extent to which the parties relied on the law that existed before the rule was announced. In re S/S Helena, 529 F.2d 744,748 (5th Cir. 1976). But we must still consider whether the retroactive application of Patterson would cause substantial injustice to these appellants.

As explained below, if we were to apply Patterson to this case, the appellants would no longer have a cause of action under section 1981. But the Supreme Court itself applied its decision retroactively to Brenda Patterson, denying her section 1981 claim. Patterson, like Carter and Jackson, chose, for unknown reasons, to pursue a remedy only under section 1981 and not under Title VII. See Patterson, 109 S.Ct. at 2375. Because the Supreme Court applied its holding retroactively to a similarly situated individual, rather than announcing a rule of prospective

application, the appellants would have a difficult time proving that retroactive application of the same decision would be unfair. See Williams v. Phil Rich Fan Mfg. Co., 553 F.2d 596,600 n. 9 (5th Cir 1977). We conclude that they have not met that burden. Therefore, we will apply Patterson's interpretation of section 1981 to this case.

EFFECT OF PATTERSON

A. Racial Harassment

Section 1981 provides, in part, that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts ... as is enjoyed by white citizens." 42 U.S.C. sec. 1981. With respect to the relationship between the employer and employee, section 1981 protects the employee's right to make contracts and to enforce contracts. Patterson, 109 S.Ct. at 2372.

The right to make contracts prohibits the employer from refusing to hire someone because of their race or from offering to hire someone only on discriminatory terms. Id. It does not protect the employee from any conduct by the employer after the contractual relationship has begun. Id. at 2373.

The right to enforce contracts is the "right of acess to legal process, that will address and resolve contract-law claims." Id. The employer may not do anything to hinder the employee's efforts to enforce the employment contract through the legal process. Id.

Patterson's interpretation of section 1981 explicitly bars any of the appellants' claims based solely on racial harassment. See id. For example, Allen's SC rating did not impair his right to make or enforce his employment contract. But the holding in Patterson was limited to racial harassment. If Carter and Jackson

were manipulated into volunteering for VAMAP, SCB's actions resulted in their discharge. This could be labeled "constructive discharge" rather than simply "harassment." Moreover, two of Allen's claims, that SCB denied him a promotion and fired him in retaliation for taking legal action against them, are also not explicitly covered by Patterson.

B. Constructive Discharge: Carter and Jackson

The Supreme Court did not decide whether section 1981 prevents an employer from firing an individual because of her race. See Lytle v. Household Mfg., Inc., ___ U.S. ___, 110 S.Ct.1331,1336 n. 3, 108 L.Ed.2d 504 (1990); Jett v. Dallas Indep. School Dist., __ U.S. __, 109 S.Ct. 2702,2709-19, 105 L.Ed.2d 598 (1989). After Patterson, we have held that it does not. See Walker v. South Cent. Bell Tel., 904 F.2d 275,276-77 (5th Cir. 1990); Lavender,897 F.2d at 807-08; Carroll v. General Accident Ins. Co. of America, 891 F.2d 1174,1177 (5th Cir. 1990). Most Circuits have agreed with us. See Gonzalez v. Home Ins. Co., 909 F.2d 716 (2d Cir. 1990); McKnight v. Ceneral Motors Corp., 908 F.2d 104, 109 (7th Cir. 1990); Courtney v. Canyon Television & Appliance Rental,Inc., 899 F.2d 845,849 (9th Cir. 1990). But see Hicks v. Brown Group, Inc., 902 F.2d 630, 638-40 (8th Cir. 1990).

Two arguments support the conclusion that section 1981 no longer applies to discriminatory discharge. First, discriminatory termination impairs the employee's right to perform the employment contract, not her right to enter into the contract nor to enforce it.

Second, if "conduct is covered by both section 1981 and Title VII, the detailed procedures of Title VII are rendered a dead letter," and, therefor, a court "should be reluctant" to construe section 1981 broadly if that construction will allow a plaintiff to circumcent Title VII. See Patterson, 109 S.Ct. at 2375. Title VII

remains a valid remedy if an employee is terminated for discriminatory reasons. See Meyer v. Brown & root Constr. Co., 661 F.2d 369,371 (5th Cir. 1981); Pittmen v. Hattiesburg Mun. Separate School Dist. 644 F.2d 1071, 1074 (5th Cir. Unit A May 1981).

We will not stretch the protection of section 1981 to conduct that Title VII already proscribes. Therefore, even if Massett did deliberately misinform Carter and Jackson about VAMAP because they are black, they would not have a cause of action against SCB under section 1981.

C. Failure to Promote Allen

Allen argues that SCB's refusal to transfer him to planning amounted to a failure to promote him. "Whether a promotion claim is actionable under sec. 1981 depends upon whether the nature of the change in position was such that it involved the opportunity to enter into a new contract with the employer." Patterson, 109 S. Ct. at 2377. The promotion must "rise [] to the level of an opportunity for a new and distinct relation betweeen the employee and the employer." Id. Cf. Saint Francis College v. Al-Khazraji, 481 U.S. 604, 609-10, 107 S.Ct. 2022, 2026, 95 L.Ed. 582 (1987)(applying section 1981 to professor's charge that he was denied tenure because of his race).

In this case, we need not dissect the Court's "new and distinct" relation criterion to test its perimeters. Cf. Malhotra v. Cotter & Co., 885 F.2d 1305,1311 (7th Cir. 1989)(proposing two interpretations of the "new and distinct relation" test). A transfer to the Planning Group was not a promotion; it was, at most, a necessary precondition to promotion, or as Allen himself calls it, "an opportunity to progress." Appellant's Opening Brief at 20. Many employees in the Planning Group were never promoted.

At the Westbank Division, a transfer to Planning was a change that was part of the ordinary progression of an SCB

engineer. See McKnight, at 908 F.2d at 110. As such, it is not within the ambit of protection given by section 1981.

D. Retaliatory Termination Against Allen

Allen claims that he was terminated because he filed a charge with the EEOC and that the reasons SCB gave for firing him - taking proprietary documents and, initially, falsifying an accident report - were pretextual.

In this Circuit before Patterson, section 1981 protected employees form retaliatory termination. See Goff Continental Oil Co., 678 F.2d 593, 598 (5th Cir. 1982). Because Goff is the law of the Fifth Circuit, we must follow its interpretation of section 1981 unless that interpretation is irreconcilable with Patterson. See United States v. Don B. Hart Equity Pure Trust, 818 F.2d 1246, 1250 (5th Cir. 1987); National Labor Relations Bd. v. Datapoint Corp., 642 F.2d 123, 129 (5th Cir. Unit A April 1981). We have questioned, but never decided, whether Goff survived Patterson[1].

See Rathjen v. Litchfield, 878 F.2d 836, 842 (5th Cir. 1989). We now hold that it does not. See, e.g., Brown v. United States, 890 F.2d 1329, 1336 & 1339 (5th Cir. 1989) (overruling a prior Fifth Circuit opinion because a subsequent Supreme Court case was implicitly inconsistent with it).

Three arguments support our holding that section 1981 no longer extends to retaliatory termination. First, Title VII will protect an employee from retaliation. See 41 U.S.C.A. § 2000e-3(a) (West 1981); Johnston v. Harris County Flood Control Dist.,

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[1] See Kozam v. Emerson Elec. Co., 739 F.Supp. 307, 310 (N.D. Miss. 1990); Jackson v. GTE Directories Serv. Corp., 734 F.Supp. 258, 265-66 (N.D. Tex. 1990).

869 F.2d 1565, 1576 (5th Cir. 1989), cert. denied, ___ U.S. ___, 110 S. Ct. 718, 107 L.Ed.2d 738 (1990). As noted above we should not interpret section 1981 to duplicate that protection unless the overlap of the two statutes is "necessary". See Patterson, 109 S.Ct. at 2375. While an employer who retaliates against an employee may discourage that employee (or others) from using the legal process, the employer has not impaired or impeded the employee's ability to enforce his employment contract. While these concepts have been construed to be synonymous, see Hicks, 902 F.2d at 638 n. 20; Malhorta, 885 F.2d at 1314 (Cudahy, J., concurring), we do not believe that it is "necessary" to do so, see Overby v. Chevron USA, Inc., 884 F.2d 470, 473 (9th Cir. 1989).

Second, when Allen filed his charge with the EEOC, he was asserting a right given to him by the Civil Rights statutes, not by his employment contract with SCB. See McKnight, 908 F.2d at 112; Sherman v. Burke Contracting, Inc., 891 F.2d 1527, 1535 (11th Cir. 1990). Therefore, Allen's right to enforce his employment contract was not impaired. Compare Goodman, 482 U.S. at 659-60, 107 S.Ct. at 2620 (challenging union's failure to assert instances of racial discrimination against employees, in violation of contractual collective bargaining agreement, under section 1981).

Finally, we have already held that discriminatory discharge is no longer actionable under section 1981. Were we to hold that section 1981 still encompasses retaliatory discharge, we would be encouraging litigation to determine what the employer's subjective motive was when he fired the employee: was it to retaliate or "merely to discriminate? This would be pointless. Both motives are equally invidious, and the employee suffers the same harm. Because section 1981 no longer covers retaliatory termination, all suits for discriminatory dismissal must be brought under Title VII.

III. TITLE VI REMEDY

Because we have decided to apply Patterson retroactively to bar their section 1981 claims, the appellants ask us to remand this case to the district court with instructions to consider their complaints under Title VII, 42 U.S.C.A. §§ 2000e to 2000e-17 (West 1981 & Supp. 1990). For the reasons given below, we decline to substitute a Title VII remedy for Carter and Jackson, but we will reach the merits of Allen's Title VII claims.

A. Carter and Jackson

Carter and Jackson never pled Title VII. Nevertheless, they claim that we have a duty to substitute Title VII for section 1981, their failed cause of action. They cite two cases for this proposition: Hildebrand v. Honeywell, Inc., 622 F.2d 179, 181 (5th Cir. 1980) and Rohler v. TRW, Inc., 576 F.2d 1260, 1264 (7th Cir. 1978). But the appellants' argument and the cited authority are relevant only if the appellants' complaint had a jurisdictional defect. See 5 C. Wright & A. Miller, Federal Practice and Procedure § 1209, at 112-14 (1990). We are not dismissing the appellants' section 1981 claims for lack of subject matter jurisdiction. See McGinis v. Ingram Equip. Co., 888 F.2d 109, 112 (Cox, J., dissenting), opinion vacated by 895 F.2d 1303 (11th Cir. 1989). We are dismissing their complaints because section 1981 no longer affords them a basis on which we can grant relief. See Bell v. Hood, 327 U.S. 678, 681-82, 66 S.Ct. 773, 775-76, 90 L.Ed. 939 (1946) (holding that federal jurisdiction exists if the complaint states a "colorable" case arising under federal law, even though on the merits the party may have no federal right); Holland/Blue Streak v. Barthelemy, 849 F.2d 987, 988-89 (5th Cir. 1988) (explaining the difference between a challenge based on jurisdictional grounds and a challenge based on a failure to state a claim upon which relief can be granted). We have no duty to substitute Carter and Jackson's abrogated theory with a valid one. See Baldwin County Welcome Center v. Brown, 466 U.S.

147, 150, 104 S.Ct. 1723, 1725, 80 L.Ed. 2d 196 (1984) (noting that Title VII actions should not be given a special status under the Federal Rules of Civil Procedure).

B. Allen

In his initial complaint, in which he alleged that SCB had discriminated against him by rating him SC rather than MC and by not transferring him to Planning, Allen asserted Title VII as one theory of recovery. He had filed his charges with the EEOC and received a right to sue for both allegations, and we will review the magistrate's dismissal of those claims.

In his amended complaint, Allen added an allegation of retaliatory termination against SCB. He never filed this charge with the EEOC, and he never received a right to sue. Normally, a Notice of a Right to Sue is a jurisdictional prerequisite to a Title VII action. See Ray v. Freeman, 626 F.2d 439, 442 (5th Cir. 1980), cert. denied, 450 U.S. 997, 101 S.Ct. 1701, 68 L.Ed. 2d 198 (1981). But because Allen's other Title VII claims were properly before the magistrate, we believe that this Court has jurisdiction over Allen's retaliatory termination claim as well. See Gottlieb v. Tulane Univ., 809 F.2d 278, 284 (5th Cir. 1987).

1. Standard of Review

A magistrate trying a case with the consent of the parties is entitled to the same deference that is given to findings of a district judge. See Lockett v. Greyhound Lines, Inc., 817 F.2d 1182, 1185 (5th Cir. 1987). Therefore, we will not set aside the magistrate's ruling unless we find that it was clearly erroneous, giving "due regard... to the opportunity of the trial court to judge the credibility of the witnesses". Fed. R.Civ. P. 52(a).

2. Performance Rating and Transfer to Planning

As noted above, SCB supervisors used both objective and subjective criteria in their performance evaluations. Although the parties dispute the relative significance of each of the objective

criterion, the magistrate found that both Allen and Johansen had the same objective ratings. Nevertheless, in the 1986 evaluation, Allen was ranked twenty-fourth and Johansen was ranked seventh. It follows that this discrepancy, and Allen's resulting SC rating[2], occurred from the use of subjective factors in evaluating the candidates.

SCB's use of subjective criteria to evaluate its engineers was not discriminatory per se. See Page v. U.S. Indus., Inc., 726 F.2d 1038, 1046 (5th Cir. 1984). But we will review SCB's subjective hiring practices under both the disparate treatment and disparate impact theories. See Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 989-90, 108 S.Ct. 2777, 2786, 101 L.Ed. 2d 827 (1988).

The disparate treatment model requires a finding of intentional discrimination. Trevino v. Holly Sugar Corp., 811 F.2d 896, 902 (5th Cir. 1987). Allen must prove more than "isolated" or "sporadic" acts of discrimination; he must prove "that racial discrimination was the company's standard operating procedure–the regular rather than the unusual practice." Id. (citing International Brotherhood of Teamsters v. United States, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed. 2d 396 (1977). A disparate impact claim does not require Allen to prove SCB's discriminatory motive, but does require him to show that facially neutral employment practices fall more harshly on one group than another and cannot be justified by business necessity. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n. 15, 97 S.Ct. 1843, 1854 n. 15, 52 L.Ed. 2d 396 (1977).

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[2] As explained earlier, only fifty percent of the engineers in the Westbank Division could receive an MC rating. Between forty and forty-five engineers worked at Westbank The MC line was drawn at Lemore Allen, allowing a white engineer, ranked twenty-third, to receive an MC rating.

The magistrate held that Allen failed to show widespread discrimination in the use of the evaluating criteria, and we agree. A white engineer, Norman Gautreaux, was rated SC based on the same subjective factors used to evaluate Allen, and Gautreaux's quality rating in 1986 was significantly higher than Allen's. Furthermore, Phil Chavers, Allen's supervisor, also evaluated Hershel Nisby, another black employee at SCB. Nisby received an MC rating.

Applying the same tests, we find no evidence than Allen was not transferred to Planning because he is black. Begnaud testified that he had considered specific criteria in selecting the new Planner, including computer knowledge, ability to coordinate projects with other engineers, engineering expertise, and ability to sell projects to the staff. Begnaud stated that he had used these same criteria to select two former Planners who are black: James Burse and Earl Jeffers. Allen argues that in several of these areas his skills were superior to those of Johansen, but he did not demonstrate a conspicuous edge in any area except length of service with SCB. Apparently, this had never been one of the criteria for a Planning job.

Therefore, we find no error in the magistrate's dismissal of Allen's racial harassment claims.

3. Retaliatory Termination

Title VII prohibits an employer from discriminating against an employee if the employee alleges that the employer has engaged in unlawful employment practices. 42 U.S.C.A. § 2000e-3(a). To prove that SCB has violated this provision, Allen must show that he engaged in an activity protected by Title VII, that an adverse employment action occurred, and that there was a causal connection between the participation in the protected activity and the adverse employment decision. See McDaniel v. Temple Indep. School Dist., 770 F.2d 1340, 1346 (5th Cir. 1985).

Although the magistrate recited this test, we are uncertain how he applied it. Because of our uncertainty, we are remanding Allen's Title VII claim for fully developed legal conclusions consistent with this opinion.

From our reading of the record, it appears that Allen has met the first two criteria. He did engage in a protected activity, and adverse consequences ensued, the most notable of which was the decision by Chavers to use sloppy work done by another employee in Allen's performance review. The only issue that remains is whether Allen's termination and his protected activities were causally connected.

The problem in determining causation in this context is that Allen's suit and his termination are inherently interrelated. Allen was charged with having turned the estimate front sheet and log book over to his attorney, and therefore, Allen's legal action must have played a role in Glen Andrew's decision to fire him.

In a mixed motive case such as this one, the usual sequence of proof used for Title VII cases does not resolve the problem. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03, 93 S.Ct. 1817, 1824-25, 36 L.Ed.2d 668 (1973). The employer cannot discharge his burden simply by proffering a legitimate reason that the magistrate believes, because both the legitimate reason and the illegal one played a part in the decision. Under these circumstances, the burden shifts to the employer to prove that he would have made the same decision regarding the employee even if he had not taken the illegitimate reason into consideration. See Price Waterhouse v. Hopkins, ___ U.S. ___, 109 S.Ct. 1775, 1786, 104 LEd.2d 268 (1989) (plurality). "[I]n multiple causation cases, where a breach of duty has been established, the common law of torts has long shifted the burden of proof to multiple defendants to prove that their negligent actions were not the 'but-for' cause of the plaintiff['s] injury." Id.

109 S.Ct. at 1797 (O'Connor, J., concurring). Furthermore, the Supreme Court has consistently shifted the burden of proof to the defendant in mixed motive cases involving constitutional violations. See Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977); Hunter v. Underwood, 471 U.S. 222, 228, 105 S.Ct. 1916, 1920, 85 L.Ed.2d 222 (1985).

Therefore, we hold that SCB must prove, by a preponderance of the evidence, that it would have fired Allen for taking the documents even if Allen had not been involved in litigation against SCB. By this we do not mean that the magistrate may not consider how Allen used the documents. For example, SCB does not have to show that they would have fired Allen had he taken these documents home and thrown them away. But they do have to show that dismissal was an appropriate remedy for personal use of proprietary information. This information was used against the company's interests; the magistrate may consider this as well.

IV. CONCLUSION

Applying Patterson, we hold that the appellants' claims of racial harassment and Carter and Jackson's claims of constructive discharge are no longer actionable under section 1981. Because Carter and Jackson pled only section 1981, we AFFIRM the judgment of the magistrate dismissing their claims.

Allen invoked the protection of Title VII in addition to section 1981. Applying Title VII, we find no error in the magistrate's dismissal of Allen's charges of racial discrimination, and we AFFIRM that decision. However, we are unable to understand the analysis that the magistrate used in dismissing Allen's claim of retaliatory termination, so we are REVERSING that portion of the case and REMANDING Allen's Title VII retaliatory termination claim to the magistrate with instructions to reconsider it in the light of this opinion.

APPENDIX B
UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 88-3777

Mary H Carter and Lemore Allen,
Plaintiffs- Appellants,
v.
South Central Bell,
Defendant-Appellee.
Tarnella (sic) Jackson, Plaintiff-Appellant,
v.
South Central Bell Telephone Co.,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 9/27/90, 5 Cir., 198_,___F.2d____)
(December 6, 1990)
Before THORNBERRY, JOHNSON and SMITH, Circuit Judges.

PER CURIAM:
(x) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petiton for panel rehearing is DENIED. No member of this panel nor Judge in regular active service of this Court having requested thet the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Sam Johnson
United States Circuit Judge

FILED
APR 4 1991
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NO. 90-1461 (2)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

Mary H. Carter, Tahnella Jackson, and Lemore Allen,
Petitioners

versus

South Central Bell Telephone Co.,
Respondent

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

SUMMARY OF ARGUMENT 1

ARGUMENT 2

1. Section 1981 does not apply to claims of discriminatory discharges

2. Section 1981 does not apply to claims of retaliatory discharges

3. The *Patterson* decision should be applied retroactively to Petitioners' claims of discriminatory discharges

4. The *Patterson* decision should be applied retroactively to Petitioner Allen's claim of retaliatory discharge

5. The Court of Appeals had no duty to replace or judicially amend Petitioners' assertion of Section 1981as a basis of their causes of action with another statutory basis the Court felt to be correct or appropriate

CONCLUSION 11

TABLE OF AUTHORITIES

Cases Page

Boyd v. Telecable of Overland Park, Inc.
752 F.Supp. 388 (D. Kan. 1990) 9

Hicks v. Brown Group, Inc.
902 F.2d 630 (11th Cir 1990) 2

Lavender v. V & B Transmissions and Auto
Repair, 897 F.2d 805 (5th Cir. 1990) 7

Patterson v. McLean Credit Union
491 U.S. 164, 109 S. Ct. 2363, 105 L.Ed.
2d 132 (1989) 1, 2, 3, 5, 7, 9, 11

SUMMARY OF THE ARGUMENT

1. Postformation conduct unrelated to an employee's right to enforce his/her contract, including discharges or terminations, is not actionable under Section 1981. Moreover, while certain postformation conduct may involve the opportunity to enter into a new contract with the employer or create an opportunity for a new and distinct relation between the employee and the employer and thus be actionable under Section 1981, such conduct as alleged in this case either does not constitute such a contract or the evidence is totally lacking to support this contention.

2. The decision in *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989) should be applied retroactively without the necessity of a case-by-case analysis to try to determine why no claim was brought under Title VII. The inevitable result of such a case-by-case analysis would be the argument that some cases warrant retroactivity and some do not, a result that would create chaos on this issue.

3. The Court of Appeals is under no duty or obligation to make a formal inquiry to determine why a suit has been brought under a wrong or improper statutute or to judicially amend the Petition to provide what the Court may deem to be a proper or appropriate statute. Even assuming, arguendo, that there was such an obligation, the ultimate result in the present proceedings would be the same, as reflected in the Trial Court's Findings of Fact and Conclusions of Law.

ARGUMENT

(1) Carter and Jackson were separated from their employment with South Central Bell Telephone Company with a receipt of monetary compensation under VAMAP (Voluntary Accelerated Management Attrition Program) and their claims may be viewed as alleging a "constructive discharge".[1] Notwithstanding the decision of the Eleventh Circuit in *Hicks v. Brown Group, Inc.*, 902 F.2d 630 (11th Cir. 1990), the language of this Court in *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989) makes it abundantly clear that the protections of 42 U.S.C. Section 1981 do not extend to such postformation conduct as discharge or termination.

> .... it is plain to us that what petitioner is attacking are the conditions of her employment.
>
> This type of conduct, reprehensible, though it be if true, is not actionable under Section 1981, which covers only conduct at the initial formation of the contract and conduct which impairs the right to enforce contract obligations through legal process. Rather, such conduct is actionable under the more expansive reach of Title VII of the Civil Rights Act of 1964. .....
>
> Interpreting Section 1981 to cover postformation conduct unrelated to an employee's

---

[1] At the time of the actions involved herein, South Central Bell Telephone Co.'s parent company was AT&T.

> right to enforce her contract, such as incidents relating to the conditions of employment, is not only inconsistent with that statute's limitation to the making and enforcement of contracts, but would also undermine the detailed and well-crafted procedures for conciliation and resolution of Title VII claims.

Patterson, supra, 109 S.Ct. at 2374.

This Court offered further evidence that Section 1981 is to be narrowly construed, so as to be inapplicable to discharges or termination, in its footnote 6:

> In his separate opinion, JUSTICE STEVENS construes the phrase "the same right .... to make ... contracts" with ingenuity to cover various postformation conduct by the employer. But our task here is not to construe Section 1981 to punish all acts of discrimination in contracting in a like fashion, but rather merely to give a fair reading to scope of the statutory terms used by Congress. We adhere today to our decision in *Runyon* that Section 1981 reaches private conduct, but do not believe that holding compels us to read the statutory terms "make" and "enforce" beyond their plain and common sense meaning. We believe that the lower courts will have little difficulty applying the straightforward principles that we announce today.

Patterson, supra, at n. 6, 109 S.Ct. at 2377, n. 6.

Counsel for Carter and Jackson also argues that the Court of Appeals was in error in failing to consider the applicability of Section 1981 to Carter and Jackson's postformation contract claims: (1) the "job protection agreement" which arose from a fellow employee's private meeting with supervisory personnel to which Carter and Jackson were not privy and (2) the VAMAP "job termination contract".

Pivotal to Carter and Jackson's argument on this point is the assertion that they were "duped" into signing documentation requesting VAMAP in the first place, that is, they signed up for VAMAP believing there were sufficient numbers of other employees also requesting it and accordingly, they would not be selected under the program. South Central Bell would respectfully submit that the evidence clearly revealed that these employees were well aware that by signing the VAMAP documents, they were indicating their willingness to leave their positions with a significant monetary inducement.

At the initial trial of these claims, a letter which Carter had previously written was introduced which clearly and unequivocably demonstrated that Carter knew that when she signed the VAMAP documents, she would be leaving her position of employment (Defendant's Exhibit No. 1). If additional evidence on this point was necessary, her husband's testimony only further confirmed her knowledge of this situation. Accordingly, South Central Bell disputes the representation now being made to this Court that Carter and Jackson signed up for VAMAP, unaware that they would be selected and believing that by doing so, they were protecting their employment.

Even assuming, however, that their argument has any factual merit, which is denied, the VAMAP documentation

which they signed is not a "new contract" actionable under Section 1981.

First, the evidence failed to establish that the VAMAP form could even be construed to be a contract. It was an expression of interest, on which each employee indicated whether or not they were interested in receiving a monetary inducement to leave their position of employment with South Central Bell. Company managers at the headquarters in Birmingham, Alabama had the option to select from those indicating a willingness for VAMAP a sufficient number to alleviate the existing surplus problem. In all, 31 employees in Petitioners' department took VAMAP, only four of whom were black, and two of these four were Petitioners Carter and Jackson. The VAMAP form was not a contract at all but, even if it were, it was not actionable under Section 1981 as a contract relative to "a new and distinct relation between the employee and the employer. *Patterson, supra,* 109 S.Ct. at 2377.

Insofar as the alleged "job protection agreement" between white employee Barbara Johansen and supervisory personnel, South Central Bell would again take exception to Carter and Jackson's representations as to what the testimony at the trial court revealed. Not only is the subject matter of the meeting between Johansen and her supervisor pure and total conjecture on Carter and Jackson's part, but Johansen specifically and emphatically denied that any job protection assurances or guarantees were made to her in any private meetings with her supervisor. Further, Johansen denied, contrary to the representations made on page 6 of the Petition for Writ of Certiorari, that she ever thanked Carter for "saving her job". In short, there was no evidence of any merit, save Carter and Jackson's unsubstantiated testimony that any private job assurances were ever made to Johansen. Even assuming such assurances were made, which is and has always been denied,

these representations would not be actionable under Section 1981 as a contract made for a "new and distinct relation between the employee and the employer." At most, it would be simply an assurance of continued employment in the same position. The fact that Carter and Jackson allege that they were excluded from such assurances does not convert such assurances to the status of a contractual opportunity from which Carter and Jackson were deprived.

Secondly, VAMAP was not an invitation to enter into a new relationship with the employer but, quite the contrary, an inducement to take a monetary sum to leave the employer.

(2) Petitioner Allen contends that he was terminated as a consequence of and in retaliation for prior EEOC charges which he filed pertaining primarily to a failure to select him for the planning group and his performance evaluations. As set forth hereinabove relative to the discharge claims of Petitioners Carter and Jackson, South Central Bell would respectfully submit that the language of this Court in *Patterson, supra*, makes it clear that Section 1981 is not applicable to such postformation conduct as discharge or termination.

(3) Even though Carter and Jackson filed a charge with the EEOC and received a right-to-sue letter, their counsel made a "conscious choice" (Petition for Writ of Certiorari, page 16) to sue under Section 1981 to seek the greater damages (emotional distress and punitive damages) available under Section 1981 but not Title VII. For this reason, they contend it would be unfair to apply the *Patterson* holding retroactively to them, inasmuch as there was no attempt on their part to avoid the concilitory procedures of Title VII.

This argument, if accepted, would necessitate a case-by-case analysis in each instance in which the retroactivity of

the *Patterson* decision was being considered as to the reasons why the plaintiff chose to file his/her suit under Section 1981 and not Title VII. The result which Carter and Jackson urge would presumably result in non-retroactivity in their case but conceivably retroactive application of *Patterson* in other cases.

However, the language of this Court in *Patterson* demonstrates that the reason why Title VII was not raised is not of pivotal importance. Retroactivity will not depend on the reasons offered as to why an action was brought only under Section 1981 or, conversely, why the action was not brought under Title VII.

> ... In the particular case before us, we do not know for certain why petitioner chose to pursue only remedies under Section 1981 and not under Title VII. See 805 F.2d at 1144, n.; Tr. of Oral Arg. 15-6,23 (Feb. 19, 1988). But in any event, the availability of the latter statute should deter us from a tortuous construction of the former statute to cover this type of claim.

Patterson, supra, 109 S.Ct. at 2375.

In the same vein, Carter and Jackson contend that the Fifth Circuit Court of Appeals was in error in finding that they were similarly situated to Patterson inasmuch as Patterson presumably did not file her suit under Title VII due to expiration of the limitation period while Carter and Jackson's limitation period had not expired; they simply chose not to allege Title VII either in conjunction with or instead of Section 1981.

Nonetheless, this is an argument of form, not substance. Whether the Fifth Circuit in *Lavender v. V & B Transmissions and Auto Repair*, 897 F.2d 805 (5th Cir. 1980)

noted that Patterson filed a Section 1981 action "presumably" because the Title VII limitation period had expired and later, in this case, stated that Patterson filed her action under Section 1981 for "unknown reasons" is of no significance. To the extent that Patterson and Carter and Jackson both filed claims with EEOC but chose to bring their legal actions under Section 1981, they are indeed similarly situated, as found by the Fifth Circuit, for purposes of the application of this Court's rationale in *Patterson* to their claims.

The reason(s) why Patterson and Carter and Jackson chose not to raise a claim under Title VII are not of critical significance to the analysis of the applicability of Section 1981 to their claims of postformation conduct of their respective employers.

Petitioners' counsel further argues that the actions of the Fifth Circuit were in error because the Court's actions "abrogated petitioners' normal pretrial right to amend to show a cause of action." It should be noted that petitioners' counsel has never sought to amend this action to assert a claim under Title VII, either pretrial or post-trial.

(4) Prior to the trial of this matter but after the filing of his initial complaint, Petitioner Allen was terminated. He thereafter amended his complaint to allege a retaliatory discharge and sought relief under Section 1981. The Fifth Circuit Court of Appeals concluded that a discharge is not actionable under Section 1981 but held that, because Allen's previous claims were before the Court under Title VII, his claim of retaliatory discharge would be before the Court under Title VII as well. Petitioner's counsel asserts that even if Section 1981 does not cover Allen's retaliatory discharge, this Court's holding in *Patterson* should not be applied retroactively to the discharge, thereby enabling Allen to seek the more expansive damages under Section 1981.

The rationale for this position is that South Central Bell, by firing Allen "without any attempt whatsoever at conciliation" has thereby "rejected the Title VII process" and should be subjected to an award of Section 1981 damages. In other words, the employer's actions dictate against retroactive application of *Patterson*.

Again, as noted hereinabove, the adoption of this theory would create a situation of retroactivity on a case-by-case basis, that is, in some Section 1981 cases, *Patterson* would be applied retroactively and in others it would not, depending on an analysis of the employer's actions. Counsel for South Central Bell would respectfully submit that once it has been concluded that the *Patterson* decision is entitled to retroactive application, as it should be, it is retroactive as to all cases.

(5) Petitioners argue that even if Section 1981 does not apply to their claims, the Court of Appeals erred in failing to substitute Title VII in place of Section 1981 in their Petition. In other words, Petitioners assert that the Court of Appeals had an affirmative duty to determine whether the Petition stated a cause of action, under Title VII, and to judicially amend the Petition if it were so found.

As this Court noted in *Patterson, supra*, "we do not know for certain why petitioner chose to pursue only remedies under Section 1981 and not under Title VII." *Patterson, supra,* 104 S.Ct. at 2375. Nonetheless, the Court did not engage in a theoretical discussion of other unpled causes of action or theories of recovery nor address whether a Title VII claim would have been timely for purposes of substituting Title VII for Patterson's Section 1981 claims. Such an analysis is no where judicially or statutorily required or mandated. In the face of a similar assertion, Chief Judge Earl O'Connor noted in *Boyd v. Telecable of Overland Park, Inc.*, 752 F.Supp. 388 (D. Kan. 1990):

> When a remedy exists under another statute (such as Title VII) it is not the Court's duty to inquire why suit was brought under the wrong law, or to tortuously stretch Section 1981 to cover the situation.

752 F.Supp. at 391.

Even were this Court to accept Petitioner's argument, a substitution and analysis of their claims under Title VII instead of Section 1981 would not alter the ultimate result, in view of the overwhelming evidence in support of the Trial Court's Findings of Fact and Conclusions of Law.

CONCLUSION

The decision of the United States Supreme Court in *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989), is applicable to discharges or termination, as well as other postformation conduct unrelated to an employee's right to enforce his/her contract. Consequently, such conduct is not actionable under Section 1981. The decision is also retroactive and, therefore, governs the Petitioners' claims in the instant proceeding. The attempt by Petitioners to portray various postformation conduct as a "new contract with the employer" and "an opportunity for a new and distinct relation between the employee and the employer" must fail because such conduct cannot be deemed legally or factually to be a contract and, at least insofar as the alleged secret job protection agreement, the evidence of such agreement, even if it could be construed to be a contract, is entirely speculative and wholly lacking in factual basis.

Finally, if Petitioners chose to bring their action under the wrong law or have cited an inappropriate statutory basis for their claim, it is not the legal duty of the Court to scrutinize their petition and make further inquiry to uncover any legal basis which may support Petitioners' claims and to judicially amend the petition to state this legal authority.

Respectfully submitted,

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Telephone Co.

(3)

NO. 90-1461

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

Mary H Carter, Tahnella Jackson, and Lemore Allen,
Petitioners

v.

South Central Bell,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SUPPLEMENTAL APPENDIX

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MARY H. CARTER &		
TAHNELLA JACKSON	*	CIVIL ACTION
	*	
VERSUS	*	NUMBER: 85-1861
	*	c/w
SOUTH CENTRAL BELL		
TELEPHONE CO.	*	85-1862
	*	
	*	SECTION: "H" (6)

Consolidated With

LEMORE ALLEN	*	CIVIL ACTION
	*	
VERSUS	*	NUMBER: 86-1240
	*	
SOUTH CENTRAL		
BELL TELEPHONE CO.	*	SECTION: "H" (6)

JUDGMENT

The above consolidated matters came on for trial on a former day, and after hearing the testimony of witnesses, considering the evidence adduced, the record and the law applicable to the cases, the court issued a written Order and Reasons for dismissal of this matter signed September 30, 1988. Accordingly,

IT IS ORDERED, ADJUDGED AND DECREED that there be Judgment herein in favor of the Defendant, South Central Bell Telephone Company, and against the Plaintiffs,

MARY H. CARTER, TAHNELLA JACKSON, and **LEMORE ALLEN,** DISMISSING Plaintiffs' Complaints, each party to bear its own costs.

New Orleans, Louisiana, this 30th day of September, 1988.

DATE OF ENTRY
OCT - 3 1988

\s\ Louis Moore, Jr.
LOUIS MOORE, JR.
United States Magistrate

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MARY H. CARTER &		
TAHNELLA JACKSON	*	CIVIL ACTION
	*	
VERSUS	*	NUMBER: 85-1861
	*	c/w
SOUTH CENTRAL BELL		
TELEPHONE CO.	*	85-1862
	*	
	*	SECTION: "H" (6)

ORDER AND REASONS

Plaintiffs, **MARY H. CARTER (CARTER)**, and **TAHNELLA JACKSON (JACKSON)**, filed civil actions in Civil District Court for the Parish of Orleans, pursuant to 42 USC 1981, et seq, alleging discrimination in employment on account of race. The matters were removed to the Eastern District of Louisiana on petition of defendant South Central Bell Telephone Company (SCB). On May 24, 1986, **LEMORE ALLEN (ALLEN)** filed a civil action in the Eastern District of Louisiana also alleging discrimination in violation of 42 USC 1981 and 42 USC 2000(e), et seq., (on account of race). **ALLEN** later filed two Amended Complaints to add a claim of unlawful retaliation. The actions were consolidated and all parties consented to proceed before the Magistrate pursuant to 28 USC sec. 636(c).

Trial was held January 12 through January 16, 1987 and on March 9, 1987. The matter was submitted upon receipt of posttrial memoranda. After considering the pleadings, testimony of the witnesses, the documents in evidence, and the law applicable to this case, the court makes the following findings of

face and conclusions of law in accordance with Rule 52 of the Federal Rules of Civil Procedure.

JURISDICTION

This court has jurisdiction of this action under Title VII, 42 USC sec. 2000(e), et seq.; 28 USC sec. 1981; 28 USC sec. 1331; and 28 USC sec. 1343.

a. **CARTER AND JACKSON**

Both **Ms. CARTER** and **Ms. JACKSON** are Black females and they contend that the program developed to reduce SCB's workforce was discriminatorily administered. At the time of the plaintiffs' departure, both worked as engineers on the Westbank, Gretna, Louisiana, under Lester Hopper, a White male, who was the Operations Manager.

As an effort to reduce its workforce, SCB developed the Management Transition and Assistance Plan (MTAP) which consisted of three programs: (1) Voluntary Accelerated Management Attrition Program (VAMAP), (2) Separation in Lieu of Relocation (SILOR), and (3) Layoff Without Pay.

Under VAMAP, an employee would leave the company and receive a lump sun as severance pay. SILOR provided that a employee who was available for reassignment could apply for jobs in other locations in lieu of layoff.

On April 6, 1984, a meeting was held to inform the employees that a surplus had been declared and that the company planned to lose 250 employees in Louisiana, 25 of these from the New Orleans area. No plans for the reduction had yet been formed.

Supervisor Pete Massett, a White male, explained the VAMAP program at a group meeting on April 11, 1984.

CARTER and Barbara Johansen, a White female engineer, were absent from the April 11 meeting. **JACKSON** was present and testified that the group was informed that all employees would be placed on the available for reassignment list and that the VAMAP program would be offered first to the most senior employees. It was also stated that there was no information as to how many employees the company would accept. **JACKSON** was one of the more junior employees and, therefore, did not think the VAMAP would be offered to her. When she was called in by Massett on April 23, 1984 and given a VAMAP form, she asked what happened and was told that the company decided tomake a blanked offer.

CARTER testified that she and Johansen met with Massett and were given essentially the same information as dispersed at the April 11 meeting.

Both **JACKSON** and **CARTER** testified that they were privately told by Massett that the company would accept only 14 VAMAP applications, not 25 as stated in the meetings, and that if they signed up for VAMAP, they would be protected from the other programs. Both made calls to determine how many employees intended to sign up for the VAMAP program. They presented this information to Massett who told them that he also discovered several people who were going to sign up for the VAMAP program. After reaching a total of about 25, both **CARTER** and **JACKSON** signed up for the VAMAP program under the presumption that because they were two of the most junior employees, the program would not be offered to them.

At some point, the company eliminated the layoff without pay program and replaced it with the Involuntary Management Attrition Program (IMAP). This program provided for involuntary separation from the company with a "transition payment" and would be applied to the most junior employees first.

CARTER testified that after the IMAP program was offered, Massett told them that they could change programs, but they would be subject to SILOR before IMAP and that unemployment compensation was guaranteed under the VAMAP program. Based on this information, **CARTER** chose to remain with VAMAP. Massett asked her to talk with **JACKSON** about it because she had not been interviewed for transfer and would probably be laid off. **JACKSON** asked Massett whether IMAP was the same as VAMAP because if so, she would take IMAP. According to **JACKSON**, Massett responded that it would not be wise to choose IMAP because employment was guaranteed under VAMAP and SILOR would be filled first.

JACKSON, CARTER and **ALLEN** all testified that during this period, Johansen was very nervous and distraught and called various sources to find a job. Johansen was the most junior engineer. There was also testimony that after Johansen privately met with Massett, she was quite calm. **JACKSON** testified that after she chose to remain with the VAMAP program, Johansen told her that she had saved her job.

JACKSON discovered on May 11, 1984, that she had been accepted for VAMAP. She was surprised and when she asked Massett what had happened, he told her that he did not know and guessed that the company had decided to accept everyone who applied.

Each employee was given a booklet explaining the (MTAP) programs.

Johansen testified that she was never told that only 14 people would be accepted for VAMAP and that she thought she would be accepted if she actually filled out the form.

Another Black engineer, Henry Johnson, Jr., testified that he was never told that only a certain number would be

accepted for VAMAP. He did testify, however, that he was told by management at some point that signing up for VAMAP would prevent exposure to SILOR. He chose no to sign up for VAMAP because he did not want to leave the company. He remembered talking with Johansen about VAMAP and suggesting to her that she contact someone regarding job interviews. Her response was that she was not selected for interviews because she did not have a technical degree; however, Johnson was sent on several interviews and he does not have a technical degree.

Peter Massett denied telling **CARTER** and **JACKSON** anything that would encourage them to take VAMAP.

Hershel Nisby, another Black engineer, testified that management did not give the number of persons who would be accepted under VAMAP. Nisby declined VAMAP because he was never told that signing up for VAMAP would protect him from SILOR.

E. Glenn Andrews, General Manager, District Distributing Services for Area Code 504, testified that VAMAP was offered to all employees but would have to be approved by the office in Birmingham. It was approved on a seniority basis. Of the 91 employees working out of the office in question, 13 signed up for VAMAP - Ten (10) Whit and three (3) Black.

LEMORE ALLEN became concerned about the surplus in November of 1983, when it was first discussed. Upon discussing the issue with Mike Neal, **ALLEN** was told that he was "not one of the people they were trying to get rid of." He did not think Johansen was worried, even though she was the most junior person in the division.

b. **LEMORE ALLEN**

LEMORE ALLEN was hired on November 16, 1972, as a 1-H, entry level associate engineer. He was the first Black

to be hired by the office in that position. **ALLEN** testified that he worked for four years as an associate before being promoted to full engineer whereas Whites hired after him in the company in the same position were promoted in about two years. **JACKSON** was promoted to full engineer in about two years in the Birmingham office. **MARY CARTER** was hired under the management program and, therefore, had to be promoted within two years or be terminated.

ALLEN seeks redress for alleged discrimination in transfer/promotion, evaluation and termination.

1. Transfer to Planning

ALLEN had been advised that any further promotion would require experience working with the planning group. In 1984, after the layoff, the Westbank lost one of its planners. The planner was James Burse, a Black man, who had acquired his position as Operation Manager. **ALLEN** later heard that Johansen was getting the position. Johansen was selected for the position in April, 1985. Johansen was six and one half (6-12) years junior to ALLEN. **ALLEN** filed a charge with the Equal Employment Opportunity Commission (EEOC).

ALLEN testified that he had stated in a document circulated by management that he was interested in working in the planning department. **ALLEN** had also spoken with Phil Chavers about this desire. After confirming Johansen's transfer, **ALLEN** wrote a letter saying that he was dissatisfied with how the selection was made. **ALLEN** was told that Johansen's rating helped her get the job.

2. Ratings

In the last rating period prior to her transfer, Johansen

was rated MC or major-contributor. **ALLEN** was rated SC or satisfactory contributor. **ALLEN** was rated MC in the previous evaluation.

According to Phil Chavers, **ALLEN** was reduced to SC because (1) the company established a rule that only 50% could receive a MC rating, and (2) **ALLEN** fell in the lower 50% because of his place on the rank order list. Subjective factors considered, Chavers testified, were:

(1) **ALLEN** did not get along with people, (2) **ALLEN** did not put 100% into his work and (3) **ALLEN's** drawings would not be exactly correct.

Chavers also testified that **ALLEN** had missed three deadlines. He recanted that testimony when confronted with a letter which showed that **ALLEN** missed only one deadline. The evidence showed that this project was assigned to **ALLEN** while he was on vacation.

Chavers also stated that he had received complaints about **ALLEN's** work from a customer and other employees of South Central Bell. The customer said that he did not want anything to do with **ALLEN**. Norman Gauthreaux, a White male and routine engineer, was reduced from MC to SC. It was specifically noted on his evaluation that he did not get along with other workers.

ALLEN testified that he was told by Mike Neal that Johansen was rated higher because she had given a lecture on the "CONECS" method at one of the monthly meetings. Each month an engineer was selected to discuss a subject.

ALLEN stated that he was the first to successfully use the CONECS method - use of cables that are connected - in an

underground cable that worked as planned. Yet Johansen, who at that time had not yet worked with the "CONECS" method was chosen to give the lecture at the monthly meeting.

ALLEN also testified that the amount of money in a project was a factor in rating. In discussing his evaluation with Chavers, **ALLEN** was told that he had enough jobs but not enough money to rank an MC. **ALLEN** further testified that he was also told by Mike Neal that money spent played an important part in evaluations.

The evaluation of Norman Gauthreaux contains a reference to the dollar amount of the jobs. Other documents show that the dollar value of each job was monitored.

It was brought out during the trial that the MC line was drawn at **LEMORE ALLEN**, allowing Boudreaux, a White engineer, to receive an MC rating. Lester Hopper testified that there were 40-45 engineers. **LEMORE ALLEN** was ranked 24; therefore, Boudreaux and Christofi, Numbers 22 and 23, respectively were ranked MC.

Also noted in Johansen's evaluation was that she trained Don Clark, the engineer hired after Johansen was moved to Planning.

Two estimate engineers lost their rating, **ALLEN** and Jessie Demouy, both Black. One Black engineer, Hershal Nisby, maintained his MC rating.

Johansen was also praised for "servicing" eight estimates, most of which were described as the most complex in the district. Chavers testified that "servicing" is not an engineering function. Hopper stated that reference to a project as complex was inappropriate.

Chavers criticized **ALLEN** in the 1985 evaluation for not showing more effort in routine evaluations. During the evaluation of January 1, 1986, it is undisputed that Johansen was assigned to the Planning Department for three months and that she was assigned to train a new engineer (Don Clark) for three weeks. Johansen completed 14 jobs in approximately nine months - seven jobs were large and six were small. **ALLEN** completed 31 jobs in approximately 12 months - twenty-five were small and six were large. (See Defendant's Exhibit #25.)

Mike Brickley, who worked with the construction group, testified as to the difficulty working with projects engineered by Johansen. He testified as to a particular job that had to be completely re-engineered. He testified that **ALLEN's** work had on occasion required re-engineering, however, overall, he found that **ALLEN's** work made his "job easier".

Joseph James, also of the construction group, testified that he had problems with Johansen's work.

Henry Johnson testified that he was told by Aaron Begnaud, another supervisor, White male, that both routine and estimate experience were needed for a job in Planning, particularly estimate work. Evidence showed that the majority of Johansen's work was routine engineering. Hamilton Neal testified that Johansen performed more rural work.

No announcements were made and no notices were posted that there was an opening in Planning. The Planning Department was headed by Aaron Begnaud. Begnaud stated that the Planning Department determines the budget and provides services when needed. Begnaud said that there were no promotions rendered out of the Planning Department. According to Begnaud, the requirements of a planner are:

(1) Adaptability
(2) Computer knowledge

(3) Coordination ability
(4) Saleability
(5) Knowledge of engineering
(6) Willingness to learn the job.

Begnaud also stated that anyone expressing an interest in planning was kept in mind and not in a file.

In September 1984, James Burse, a Black planner, was terminated and Begnaud needed to fill the position. Begnaud got the go-ahead from management to fill the position. Begnaud decided that Barbara Johansen was the person for the job. Begnaud stated that Black planners James Burse and Jeffers were selected in the same manner as Johansen.

Begnaud testified that he considered the following factors in selecting Johansen for the Planning Department: (1) estimate work; (2) engineering knowledge and expertise; (3) computer use; (4) urban experience; and, (5) ability to sell projects to the staff (helpful but not necessary); and (6) ability to coordinate a deal with engineers.

ALLEN was again rated SC in the January 1986 evaluation. In March of 1986, **ALLEN** filed the instant action.

3. Termination - Retaliation

ALLEN testified that projects were taken from him and given to Johansen and other engineers. **ALLEN** wrote a letter to his supervisor, Phil Chavers, outlining nine (9) areas of contention. Chavers did not address all nine inquiries. During this conversation, **ALLEN** testified that Chavers remarked "Everybody knows you filed the lawsuit".

In July of 1986, **ALLEN** was assigned a project. **ALLEN**

was scheduled for a vacation. Before leaving, **ALLEN** was allowed to transfer the project to another engineer for completion. The estimate, complete with mistakes, was issued in **ALLEN's** name. Chavers admitted at trial that he knew some of the writing was not **ALLEN's** and that the estimate had been completed by another engineer. Further, the evidence showed that the signature on the estimate was not **ALLEN's**. **ALLEN's** duties and workload were reduced.

Two reasons were given by South Central Bell as reasons for **ALLEN's** termination: (1) distributing propriety information, and (2) falsifying an auto accident report.

In August of 1986, J. Courtney Wilson, Attorney for plaintiff, deposed employees of the defendant. During questioning, Attorney Wilson referred to an estimate front sheet. Lester Hopper was present. Hopper later reported to J. J. Banquer, the security investigator, that Wilson was in possession of the document. **ALLEN** was questioned but refused to answer without consulting with his attorney. The security investigation report was sent to Glenn Andrews on September 26, 1986. **ALLEN** later stated that he thought the documents had been subpoenaed by his attorney. Glenn Andrews testified that he determined that **ALLEN** should be terminated after consulting with the Legal Division of the Personnel Department.

Evidence showed that the documents were not marked proprietary and there was testimony that such documents could be retrieved from trash cans in the office. South Central Bell Executive instructions state that all "proprietary" documents should be so marked. Employee instructions state that employees are not to divulge to any unauthorized person any proprietary information of the company, including documents affiliated or associated with the Bell Company. Evidence was also introduced of 14 employees who has used proprietary information to obtain

prizes from Radio Station "B-97". Twelve (12) of the employees were white and two (2) Black. The two Black employees denied any wrongdoing. The White employees admitted the scam and were suspended for four weeks. It was not stated whether the proprietary information was marked as such. All the employees reportedly cooperated in the security investigation.

On September 26, 1986, while performing duties of his employment, **ALLEN** drove his company's vehicle over a street curb sustaining damage to said vehicle. **ALLEN** testified that when he relayed the circumstances to a manager, he was told to treat it as a flat tire. There was no contradictory testimony. **ALLEN** filed a report as required, stating what occurred.

On October 2, 1986, Phil Chavers told **ALLEN** that he would have to write a full report for an Accident Investigation Committee meeting. Company management later determined that **ALLEN** should be terminated for filing a false accident report.

On October 16, 1986, attorney for defendant, Charles Rivet sent a memorandum to Andrews stating

> "I think it's time we go on the offensive re Wilson's possession of proprietary information, etc."

ALLEN was terminated on October 21, 1987.

Evidence also was introduced of an accident involving two South Central Bell employees, Don Clark, a White male, and Rudy Courseault, a Black male, where they were cited for filing a false report relative to an accident in a company truck. When confronted with the incident, it was determined that Don Clark had falsified the report. He was disciplined by being placed on a period of unpaid leave and transferred to another department.

4. Pattern And Practice

There was much testimony that the South Central Bell supervisors did not like Blacks and did not want Blacks to work for the company, Herb Lietz, a former district manager of Cable Maintenance on the Westbank, testified that the Tchoupitoulas Work Center was called "Little Africa" and "Zulu Land" by the White SCB employees because a number of Blacks were employed at the Center. Lietz last worked at SCB in 1981. Lietz also testified that SCB operated under a consent order under Equal Employment Opportunity Commission (EEOC) guidelines, which provided for filling minority quotas. According to Lietz, management, including Lester Hopper, avoided meeting the quotas and promoting Blacks by appointing a White male to "relieve" for a job until a White male slot was available and that Les Hopper was fully aware of this. Lietz testified "we all made remarks" such as "Everybody's got to have a nigger".

Lietz also stated that Hopper was aware that Black and White slots were traded between the managers. He also stated that minorities were not promoted because they were not qualified or because they did not want to promote qualified minorities. Lietz claimed that every qualified Black was promoted.

Keith Francis, a Black, former manager for SCB, testified that racism was rampant in the SCB Company. When his department was top-rated, he was called the "great Black hope" rather than a good manager. He was referred to on occasion in racist terms particularly by Hopper, who on more than on occasion made racial remarks in references to positions and promotions in 1982. E.g., "Everybody's got to have a nigger." Francis left SCB via VAMAP in 1985, thereby receiving $17,000.00. Although Francis reportedly received an outstanding rating and a promotion under Hopper, Francis stated that he left SCB because of the racial slurs and his interest in his

part-time business. Additionally, Francis stated that he did not file charges with the EEOC, and that he did not file a complaint with SCB concerning the racial slurs.

Hamilton M. Neal, Jr., a White, former SCB manager of outside planning engineering, also testified that he has heard Pete Massett make a racial comment.

CONCLUSIONS OF LAW

A plaintiff bears the burden of proof in an employment discrimination case. First, plaintiff must establish a prima facie case of discrimination. A prima facie case is evidence of facts from which one can "infer discriminatory animus because experience has proved that in the absence of any other explanation, it is more likely that not those actions were bottomed on impermissible considerations." Furnco Construction Corporation v. Waters, 438 U.S. 567, 98 S.Ct. 2943, 2951, 51 L.Ed.2d 957 (1978).

The burden then becomes that of the defendant to present some legitimate non-discriminatory reason for the action in question. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). This is a burden of production, not persuasion.

This rebuts the presumption of intentional discrimination. The plaintiff must then show that the reasons proffered are mere pretext. The burden of persuasion remains with the plaintiff. The ultimate question is whether the defendant intentionally discriminated against the plaintiff. Once the court accepts evidence of a legitimate, nondiscriminatory reason for the apparent disparate treatment, the question for the court is whether plaintiff met his ultimate burden of proving discrimination. See United States Postal Service Board of Governors v.

Aikens, 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983). The plaintiff can establish intentional discrimination by directly persuading the court that a discriminatory reason more than likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. Bohrer v. Hanes Corp., 715 F.2d 213, 218 (5th Cir. 1983), cert. denied, __ U.S. __, 104 S.Ct. 1284, 79 L.Ed.2d 687 (1984); Ratliff v. Governor's Highway Safety Program, 791 F.2d 394, 400 (5th Cir. 1986) (citing Burdine, 450 U.S. 248, 256, 101 S.Ct. 1089, 1095, 67 L.Ed.2d 207 (1981)). See also Kendall v. Block, 821 F.2d 1142, 1146 (5th Cir. 1987).

In McDonnell Douglas v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), the court held that to establish a prima facie case, the plaintiff must show (1) that he belongs to a racial minority, (2) that he applied and was qualified for a job for which the employer was seeking applications, (3) that, despite his qualifications, he was rejected, and (4) that after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

This, however, was "Never intended to be rigid, mechanical, or ritualistic". Furnco, 438 U.S. at 577, 98 S.Ct. at 2949.

1. **CARTER and JACKSON - Layoffs**

From the facts presented at trial, this court cannot find that unlawful discrimination was the reason for the layoff of **CARTER** and **JACKSON.** The preponderance of the evidence showed that **CARTER** and **JACKSON** strategically, but voluntarily, chose and maintained the VAMAP option as a means of protecting themselves from transfer or IMAP. Unfortunately, a company decision resulted in their layoff.

The preponderance of evidence also showed that **CARTER** and **JACKSON** were given the same information about the MTAP program that was given to all other employees, including **ALLEN** and Nisby, both of whom chose not to sign up for the VAMAP program.

CARTER and **JACKSON** cannot prevail on their claims.

2. **ALLEN** - Transfer and Evaluation
(Planning Department)

> In order to establish prima facie case of race discrimination in context of failure to promote, a plaintiff must show that he belongs to protected group, that he was qualified for an applied for promotion, that he was considered for and denied the selection, and that similarly qualified employees from outside plaintiff's protected group was selected at time that plaintiff was rejected. -Bennett v. Texas Bd. of Pardons and Paroles, 670 F.Supp. 196 (E.D. Tex. 1987).

ALLEN was available for the position. Evidence showed that the company was aware that **ALLEN** wanted an opportunity to work in the Planning Department. He was presumptively qualified and he was rejected.

The reasons South Central Bell offers for its failure to choose **ALLEN** for the position are worthy of credence.

In the evaluations dated January 1, 1985 and January 1, 1986, **ALLEN** was rated as a satisfactory contributor (SC). In the evaluation of July 1, 1984, **ALLEN** had been rated a "major contributor" (MC). **ALLEN** contends that the SC ratings were assigned to him because of his race and that he performed

equally, as well or better than a White employee, Barbara Johansen, who received "MC" on both evaluations dated January 1, 1985 and 1986. Phil Chavers, **ALLEN's** Supervisor, explained how **ALLEN's** 1984 rating had been upgraded from SC to MC. Chavers also explained why **ALLEN** received SC rating for the 1985 and 1986 evaluations. Chavers supervised 3 Black and 5 White engineers.

Both **ALLEN** and Johansen had about the same objective criteria comparison rating. (See Appendixes A and B.) The subjective criteria considered at the ranking meetings made the difference.

The use of subjective criteria in evaluating employees does not, standing along, establish racial discrimination nor does it require the evaluation be set aside. Page v. U.S. Industries, Inc., 726 F.2d 1038, 1046 (5th Cir. 1984).

Chavers also stated that "we looked at the person who could put work out for less money".

Aaron Begnaud's, Supervisor of the Planning Department, explanation of selecting Johansen for the planning job instead of **ALLEN** is not pretextual and said selection does not amount to intentional racial discrimination. Numerous White employees in the Westbank district, who had previously rated MC, were also rated SC during the same periods as **ALLEN**. For example, Norman Gautreaux appears to have performed comparably to than **ALLEN** in the evaluation of 1986. However, Gautreaux received SC ratings because of the same subjective criteria applied to **ALLEN.**

In Barnes v. Yellow Freight Systems, Inc., 778 F.2d 1096, 1101 (5th Cir. 1985), the Court of Appeals stated the following when it vacated and remanded the district court's entry

of judgment in favor of Yellow Freight Systems, Inc., for determination of whether Barnes had received more severe treatment because of his race. ...a court faced with a disparate treatment Title VII case such as this one must often look behind an employer's words and ask probing questions about the practices about the workplace, seeking out an attempting to resolve any inconsistencies in the manner of dealing with the employees in question. We should not be satisfied with anything less than a probing analysis of the facts, if two (2) people of different races, similarly situated, receive different treatment from their employer. (After remand, the district court found no racial discrimination. The decision was affirmed in Barnes v. Yellow Freight Systems, 830 F.2d 61 (5th Cir. 1987)).

During the period covered by the evaluation of January 1, 1986, **ALLEN's** quality of work was less than that of Johansen and in two instances, was less than that of other White employees who were also rated SC. During the evaluations of January 1, 1985 and 1986, Hershel Nisby, a Black co-worker of **ALLEN's**, received an MC rating from the same White supervi sor who rated **ALLEN.**

The reasons proffered for evaluating **ALLEN** SC and for not transferring **ALLEN** to the Planning Department are not pretextual. The defendant has presented legitimate non-discriminatory reasons for its action. Plaintiff has not proved that the defendant intentionally discriminated against him regarding rating and transfer/promotion to the Planning Department.

3. **ALLEN - Retaliation**

To establish a prima facie case of retaliation, **ALLEN** must show (1) that he engaged in a protected activity, (2) adverse employment action followed, and (3) the adverse action was linked to the protected activity. Goff v. Continental Oil Co., 678 F.2d 593 (5th Cir. 1982).

ALLEN filed a complaint with the Equal Employment Opportunity Commission. Thereafter, his job duties were reduced and eventually he was fired.

On October 21, 1986, **ALLEN** was terminated from his employment from SCB. **ALLEN** contends that his discharge was prompted by intentional racial discrimination on account of his filing a lawsuit against the defendants.

The decision to terminate **ALLEN** was made by Glenn Andrews, General Manager. The defendant had sufficient information to form a reasonable basis on which to believe that the documentation containing propriety information was given without authorization by **ALLEN** to his counsel for possible use against the defendant in pending litigation. The subject documents contained proprietary information which **ALLEN** had acknowledged was not to be made available to unauthorized persons. (See Defendant Exhibits 19, 15, 14.). Said conduct amounts to a violation of SCB's rules and regulations.

Additionally, **ALLEN** refused to cooperate in the SCB's security investigation without first conferring with counsel. **ALLEN** was advised that if he refused to cooperate, that further action could be taken based on available information.

ALLEN's violation of company rules and regulations and his refusal to cooperate with the security investigation provided a legitimate and an appropriate basis upon which to impose the discipline of termination. There is no evidence that White employees, having engaged in similar conduct were treated in a less severe manner.

Thus, **ALLEN's** retaliation claim must fail.

Accordingly, IT IS ORDERED that Judgment be entered in favor of South Central Bell Telephone Company and against **MARY H. CARTER, TAHNELLA JACKSON,** and **LEMORE ALLEN,**

DISMISSING the Complaints and Amended Complaints in this consolidated matter.

New Orleans, Louisiana, this 30th day of September, 1988.

\s\ Louis Moore, Jr.
LOUIS MOORE, JR.
United States Magistrate

APPENDIX "A"

DEFENDANT EXHIBIT #24

EVALUATION OF JANUARY 1, 1985
COVERING PERIOD
JULY 1, 1984 - DECEMBER 31, 1984

JOBS

	Small	Large	Total
Lemore Allen	6	5	11
Barbara Johansen	12	1	13
Lloyd Massey	50	5	55
Don Clark	13	5	18
Norman Gauthreaux	31	12	43
Richard Cernich	10	4	14

ESTIMATES AND COMPLEXITY

Lemore Allen 14	2 Est. Submitted	8 Simple
	6 Sets of Drawings Issued	6 Complex
	7 Est. Serviced	0 Extremely Complex
Barbara Johansen .. 9	1 Est. Submitted	4 Simple
	1 Set of Drawings Issued	2 Complex
	8 Est. Serviced	3 Extremely Complex

Lloyd Massey.....0
Don Clark.....0
Norman Gauthreaux....0
Richard Cernich 0

COMMITMENTS

Lemore Allen	96% Met or Exceeded; 4% Missed
Barbara Johansen	96% Met or Exceeded; 4 % Missed
Lloyd Massey	88% Met or Exceeded; 4% Missed
Don Clark	92% Met or Exceeded; 8% Missed
Norman Gauthreaux	95% Met or Exceeded; 5% Missed
Richard Cernich	95% Met or Exceeded; 5% Missed

SCHEDULE OF ESTIMATES

Lemore Allen	No Misses
Barbara Johansen	No Misses

SAFETY

Lemore Allen	No Accidents
Barbara Johansen	No Accidents
Lloyd Massey	1 Accident
Don Clark	0 Accidents
Norman Gauthreaux	0 Accidents
Richard Cernich	0 Accidents

QUALITY

Lemore Allen	Met Quality Commitment
Barbara Johansen	Met Quality Commitment
Lloyd Massey	1.0 (1.2 or less acceptable)
Don Clark	Not Rated
Norman Gauthreaux	1.0 (1.2 or less acceptable)
Richard Cernich	1.0 (1.2 or less acceptable)

APPENDIX "B"

DEFENDANT EXHIBIT #25

EVALUATION OF JANUARY 1, 1986
COVERING PERIOD
JANUARY 1, 1985 - DECEMBER 31, 1985

JOBS

	Small	Large	Total	
Lemore Allen	25	6	31	
Barbara Johansen	7	7	14	*
Lloyd Massey	64	19	83	
Don Clark	44	11	55	
Norman Gauthreaux	55	16	71	
Richard Cernich	39	13	52	

ESTIMATES AND COMPLEXITY

Lemore Allen 15	5 Est. Submitted	9 Simple
	4 Sets of Drawings Issued	5 Complex
	12 Est. Serviced	0 Extremely Complex
Barbara Johansen .. 12	*0 Est. Submitted	0 Simple
	4 Sets of Drawings Issued	3 Complex
	12 Est. Serviced	2 Extremely Complex
Lloyd Massey 1	1 Est. Submitted	Extremely Complex
	1 Set of Drawings Issued	
	1 Estimate Serviced	

Don Clark 1	1 Estimate Submitted 1 Set of Drawings Issued 1 Estimate Serviced	Complex

Norman Gauthreaux .. 0
Richard Cernich 0

COMMITMENTS

Lemore Allen	88% Met or Exceeded, 12% Missed
Barbara Johansen	88% Met or Exceeded, 12% Missed
Lloyd Massey	76% Met or Exceeded, 24% Missed
Don Clark	76% Met or Exceeded, 24% Missed
Norman Gauthreaux	86.4% Met or Exceeded, 13.6% Missed
Richard Cernich	86.4% Met or Exceeded, 13.6% Missed

SCHEDULE OF ESTIMATES

Lemore Allen	No Misses
Barbara Johansen	No Misses
Lloyd Massey	No Misses
Don Clark	No Misses

SAFETY
NO ACCIDENT FOR ANY OF THE
NAMED EMPLOYEES

QUALITY (85 OR ABOVE ACCEPTABLE)
LAST TWO QUARTERS

	3rd Qtr.	4th Qtr.	Av. for Year
Lemore Allen	84.4	97.7	87.4
Barbara Johansen	96.3	98.0	97.6
Lloyd Massey	81.0	77.0	80.0
Don Clark	86.0	88.0	88.0
Norman Gauthreaux	98.1	99.3	98.0
Richard Cernich	80.6	92.9	87.0

Supreme Court, U.S.
FILED
MAY 15 1991
OFFICE OF THE CLERK

NO. 90-1461

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

Mary H. Carter, Tahnella Jackson, and Lemore Allen,
Petitioners

versus

South Central Bell Telephone Co.,
Respondent

REPLY TO THE OPPOSITION FOR
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
AND SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

Page

Table of Contents i
Table of Authorities ii
Summary of Argument 1
Argument 2

Reply Brief

1. Certiorari should be granted in order to remand the two Patterson contracts issue and retroactivity 1

2. There is no further argument 5

3. Patterson does not foreclose "fairness" findings, despite the Fifth Circuit's blanket prohibition; only a narrow class of non-retroactivity is sought .. 5

4. There is no further argument 7

5. The Fifth Circuit departed from custom and duty by refusing (pending appeal) to substitute a new legal theory for the cause of action; substitution is the equivalent of the usual motion to amend 7

Supplemental Brief

* The Seventh Circuit has rejected the "but for" rule which was applied by the Fifth Circuit in the Allen case 8

Conclusion 9

TABLE OF AUTHORITIES

Cases Page

Hunter v. Underwood, 471 U.S. 222, 228, 105 S.Ct. 1916, 1920, 85 L.Ed.2d 222 (1985) 5

McCarny v. Kemper Life Ins. Companies, 924 F.2d 683 (7th Cir. 1991) .....

Mt. Healthy City School Dist. Bd. of Education v. Doyle, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed2d 471 (1977) 5

Rex Oil, Ltd. v. M/V Jacinth, 873 F.2d 82, 88 (5th Cir. 1989).....3

Patterson v. McLean Credit Union, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed. 2d 132 (1989) .....passim

Price Waterhouse v. Hopkins, U.S. ___, 109 S.Ct. 1775, 1786, 104 L.Ed2d 268 (1989) 5

Weaver v. Casa Gallardo, Inc., 922 F.2d 1515 (11th Cir. 1991).....3

Other Authorities

Black's Law Dictionary, 5th ed., p. 425 4

SUMMARY OF THE ARGUMENT

REPLY BRIEF

* Introduction: As to the Carter/Jackson cases, the Fifth Circuit overlooked the two contracts issues and made fact findings on the issue of Patterson retroactivity. These are matters that should be considered on remand and are not bases for denying certiorari.

1. The Fifth Circuit should have remanded both the two Patterson contracts issues and the issue of retroactivity. It was error for the court to overlook the contracts issues and to decide retroactivity under a blanket rule without "particular" findings. This remand should be made with other issues such as the voluntariness of petitioner's taking VAMAP.

2. There is no further argument.

3. Patterson does not foreclose "fairness" inquiries as to retroactivity. The instant Fifth Circuit blanket rule of non-retroactivity and is unusual and conflicts with its own precedents.

4. There is no further argument.

5. The Fifth Circuit departed from custom and normal procedure by refusing to find a cause of action by substitution in the "noticed" facts. Petitioners would have been better off by not pleading any theory of action. Substitution simply remedies the petitioners' unfortunate timing to have finished trial, appealed, and therefore passed the point of being permitted to amend.

SUPPLEMENTAL BRIEF

* The Seventh Circuit has rejected the "but for" rule which was applied by the Fifth Circuit such that certiorari should be granted.

ARGUMENT

INTRODUCTION

South Central Bell opposes the first four grounds, e.g., the two claimed contracts, for granting certiorari on heavily factual bases, not the considerations of Rule 10. The Fifth Circuit overlooked the issue whether two agreements were Patterson contracts and decided the case on other grounds. However, this Court is not the forum to determine if the two agreements are Patterson contracts or, for that matter, to determine numerous other factual issues. Instead the contracts issue should be remanded to the trial court which has never had an opportunity to make a finding. Moreover, as was argued to the Fifth Circuit, the entire initial Carter/Jackson matter (along with the later developed Patterson contracts and retroactivity issues) should be remanded (as was done with the Allen matter) for an explanation under rule 52a, FRCP. However, for the sake of caution, petitioners will make a factual reply.

1. The argument that either or both petitioners knew that by signing the VAMAP agreement they intended to resign or knew that they were resigning was not reached by the Fifth Circuit. Moreover, the trial court judgment of voluntariness was not based on either of the evidentiary items (the incomplete, rough draft letter of Carter alone, not Jackson, and the testimony of Carter's husband, not Jackson's) cited by South Central Bell. The trial court did not even mention these two (2) items. Obviously it did not base its finding on them.

There is abundant evidence that petitioners would never have signed the VAMAP contract without: (1) the repeated misrepresentations of their immediate supervisor (Massett) that the VAMAP quota (13 or 14) was already full when they signed and (2) the supervisor's admittedly supplying petitioners the names of other employees whom he specifically misrepresented as filling the quota. However, although recited by the trial court, this (and other) "inducement" evidence was not evaluated by the trial court for its affect on the petitioners' thinking about "voluntarily" taking VAMAP.

Furthermore, the issue whether the 1984 VAMAP "form" is a contract was also not considered or determined by the fact finder. Obviously, the court did not reach the issue whether the "form" was a Patterson contract. By its very terms, it was an "offer" and no one who signed it was "turned down". South Central Bell cannot have it both ways: the VAMAP document can not be both a mere solicitation (as South Central Bell argued through the appellate level) and a contract, the effect of which was known to petitioners. Further, the so-called "form" was one of several contract choices in a layoff package and was no less a contract than the others. Finally, it varies significantly from the 1985 "form" in that the later version omits entirely the word "offer".

As to the issue whether the "form" was discriminatorily aimed at petitioners, defendant fails to advise this Court that: everybody in petitioners' work group, Westbank Engineering, who took VAMAP was black; that, in fact, the only employees who took VAMAP were petitioners themselves; and that unless both took VAMAP, Johansen would be the first to be laid off according to inverse seniority under another program.

Furthermore, the threshold issues of the closed meeting and secret job protection agreement were recited, but not evaluated by the trial court either with respect to discriminatory animus or to their corresponding effect on petitioners' voluntariness. Again (to argue facts that should be found by the trial court on remand),

the evidence showed that Johansen went into the meeting very apprehensive about losing her job, but immediately afterward quit worrying and started buying new clothes. Even before petitioners knew that they had been "accepted" for VAMAP, Johansen knew of the acceptance and she knew the consequences: she admittedly thanked Jackson for "saving her job". (The petition was in error in stating that Johansen admittedly thanked Carter.) The trial court neither drew nor declined to draw an inference of a secret VAMAP deal from: (a) the closed meeting; (b) Johansen's radically changed behavior; (c) the supervisor's admitted "full quota" (mis)representations to petitioners and (d) Johansen's admitted (and advance) thank-you to Jackson. As with the VAMAP "forms" there was no finding as to whether the closed meeting resulted in an agreement and, just as obviously, none as to its qualification as a Patterson contact.

Accordingly, the fact-finding issues of an inferred secret job protection agreement, the contractual nature of the 1984 "form" (especially in light of the 1985 VAMAP "form"), and the voluntariness of the VAMAP agreements of both Carter and Jackson, individually and separately, should be remanded to the trial court (as was argued to the Fifth Circuit).

Last, but not least, the questions still remain whether one or both of the claimed contracts qualify as actionable exceptions to Patterson under sec. 1981 and, if so, the effect on the issue of employer deception versus employee(s) knowledge. The issue whether these agreements should be characterized as Patterson contracts should also be remanded. Weaver v. Casa Gallardo, Inc., 922 F.2d 1515, 1520 (11th Cir. 1991), Rubin, Circuit Judge, sitting by designation); Rex Oil, Ltd. v. M/V Jacinth, 873 F.2d 82, 88 (5th Cir. 1989) (characterization of an agreement is a fact issue).

As to how the Patterson contract(s) issue should be decided, there seems to be a lack of authority after Patterson in support of either side,

Answering that question for the petitioners does not require a broad interpretation of a Patterson contract: All that is necessary - whether the contract is made before or during employment - is that it signal a new and distinct employer/employee relation. It is far too facile to say that the secret agreement was merely an assurance of continued employment in the same position. Certainly there was no promotion or even a change of position involved, but obviously this secret agreement "involve(d) the right to make a contract" and did merely not "implicate the performance of established contract obligations and the conditions of continuing employment...." (emph. added).

Counsel for South Central Bell misplaces his emphasis on a "change in position." Rather, the emphasis of Patterson is on a new and distinct employer/employee relation that can be found without a new position. If petitioners had been included in the secret agreement, they would have had job security - protection from the impending layoff - that no one else had. A distinct relation is one that is clearly not the same. (Black's Law Dictionary, 5th ed., p. 425.) It is hard to imagine a newer and more distinct relation with one's employer.

Finally, this "closed meeting" deal had nothing to do with the performance of the existing contract nor with "continuing" employment. In fact, it concerned a brand new arrangement and petitioners' "terminating" employment.

Therefore, the petition should be granted and the Patterson contracts issued be remanded.

2. As to whether Patterson applies to retaliatory discharge, no further argument is necessary.

3. An additional reason for remand is that even if the agreements are found not to be Patterson contracts, the Carter/Jackson sec. 1981 complaints might still be saved if the trial court finds that it is not fair to apply Patterson retroactively. The Fifth Circuit made the fact determinations that petitioners and Ms. Patterson

were similarly situated, that petitioners would have a difficult time showing hardship/unfairness, and that accordingly Patterson should apply retroactively. Because Patterson was not decided until after trial, the facts as to fairness were of course not developed or decided at trial. For this reason the issue of retroactivity should be remanded.

South Central Bell also argues that such a "fairness" inquiry would require a case-by-case analysis as to the reasons why a suit was filed under sec. 1981, not Title VII. Counsel also seems to suggest that this Court held that a "motive" inquiry was foreclosed and that no explanation (even of a benign motive) would ever excuse filing a complaint under sec. 1981. It does not appear that Patterson intended this result. Instead, it seems that this Court in that "particular case" wanted only to avoid a "tortuous" construction of sec. 1981. Patterson, supra, 109 S.Ct. 2375. Under the reasoning of counsel (see Opposition, p. 9) and the Fifth Circuit, all sec. 1981 claims would be automatically dismissed retroactively and no "fairness" inquiry could ever be made. This is not the usual Fifth Circuit rule. (Appendix, pp. A-11 et. seq.)

However, a case-by-case inquiry is the usual procedure and it was error for the Fifth Circuit effectively to create a rule of blanket retroactivity, particularly where no inquiry has been made if "tortuous" construction of sec. 1981 is required to cover the instant complaints. Accordingly, the petition should be granted.

Regardless, no such "motive" inquiry is required here where it can be shown that petitioners had fully complied with Title VII and that their sec. 1981 action was also timely as to Title VII. Compliance and timeliness create an identity between the sec. 1981 and Title VII actions that avoids any inquiry into motives and creates only the narrowest exception to Patterson retroactivity, that exceptional class of cases being those where Title VII procedures and timeliness were fully met. For the same reasons

as urged above, the petition should be granted.

(Additionally, should petitioners' contract and nonretroactivity arguments fail, this identity points to the court's duty (and the ease with which it may be fulfilled) to find a cause of action in the facts of the "notice" complaints.)
Furthermore, as will be argued below, due to the "luck" of timing, petitioners, as opposed to later litigants, have lost the usual right to amend and this inopportune scheduling supplies an additional reason for non-retroactivity.

Finally, because the Patterson contracts and retroactivity issues are closely connected fact issues (if the first argument fails, the second might succeed), this Court should grant certiorari and both should be remanded.

4. As to whether Patterson can fairly be applied to Allen's retaliatory discharge, petitioners continue to be of the opinion that this is a fact issue that should be remanded to the trial court. Counsel suggests a blanket retroactivity rule, but this is not the law.

5. "A rose is a rose by any other name".

South Central Bell argues that in refusing to scrutinize the Carter/Jackson complaints the Fifth Circuit did not depart from the accepted and usual course of judicial proceedings because it had no such duty and, further, that there was no abrogation of the usual right to amend.

Preliminarily, petitioners are now in the strange situation of being in a worse position than if they had pled no theory of action whatsoever. Had they pled none, there would be no question of substitution and the usual judicial duty might appear more clearly. Moreover, the fact that this is a civil rights matter does not require a special rule either for or against substitution. The usual rule in all Circuits which seem to have considered the issue is set out in the Petition (pp. 13 et seq.).

Furthermore, petitioners have had the misfortune already to have tried and appealed their cases when Patterson was decided and therefore to have passed the normal opportunities to amend. Because of the luck of timing, they have lost this normal right. Substitution simply remedies this misfortune.

SUPPLEMENTAL BRIEF

In discharging Allen, the Fifth Circuit found that South Central Bell had acted partly out of a retaliatory motive, but offered it the opportunity to show that it would have made the same decision anyway for a proper motive. (Appendix, pp. A-21 et seq.) As authority for this "but for" holding it cited the "plurality" opinion of this Court in Price Waterhouse v. Hopkins, U.S. _____, 109 S.Ct. 1775, 1786, 104 L.Ed.2d 268 (1989) and then quoted the concurring opinion of Justice O'Connor. The Fifth Circuit also cited Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed2d 471 (1977); Hunter v. Underwood, 471 U.S. 222, 228, 105 S.Ct. 1916, 1920, 85 L.Ed.2d 222 (1985).

However, as appears from McCarny v. Kemper Life Ins. Companies, 924 F.2d 683 (7th Cir. 1991) n.1 (decided February 6, 1991, received in slip form April 1, 1991), the plurality opinion in Price Waterhouse is that the defendant is not entitled to an opportunity to show that it would have fired the plaintiff for the "good" reason. That is, once the plaintiff shows that the defendant had acted out of a bad motive, plaintiff wins.

Accordingly, there is now a conflict between the Fifth and Seventh Circuits such that this Court should grant certiorari on this issue.

CONCLUSION

This Court should grant certiorari on all issues, both original and supplemental.

Respectfully submitted,

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